TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~595~~ 206.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY AND FEDERAL MINING AND SMELTING COMPANY, APPELLANTS,

vs.

KENNEDY J. HANLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

FILED FEBRUARY 13, 1906.

(20,097.)

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1 *Complaint.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,

vs.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and the FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

To the Honorable Judges of the Circuit Court of the United States in and for the District of Idaho.

Kennedy J. Hanley, a citizen and resident of the State of Idaho brings this bill against the Empire State-Idaho Mining and Developing Company, a corporation, organized under the laws of the State of New York, and a citizen and resident of said State, and the Federal Mining and Smelting Company, a corporation organized under the laws of the State of Delaware, and a citizen and resident of said State; and thereupon your Orator complains and alleges:

1. That complainant is now and during all of the times herein mentioned has been a citizen and resident of the State of Idaho, residing at Wardner, Idaho.

2. That defendant Empire State-Idaho Mining and Developing Company is now and ever since May, 1898, has been a corporation, organized under the laws of the State of New York, and is now and has been a citizen and resident of said State of New York and is doing business in the State of Idaho, and has appointed its agent residing therein upon whom process may be served.

3. That the Federal Mining and Smelting Company is now and ever since Septebmer, 1903, has been a corporation organized under the laws of the State of Delaware, and is now a citizen and
2 resident of said State of Delaware. Said corporation is engaged in the business of mining in the State of Idaho and has designated its agent in said State upon whom process may be served.

4. That complainant and defendant Empire State-Idaho Mining and Developing Company are the owners of and possess as tenants in common the Skookum Mine and mining claim and the ores therein contained, which said Mine and mining claim is situated in Yreka Mining District, Shoshone County, Idaho, and a patent for which has been heretofore issued to the predecessors in interest of complainant, said claim and mine having been designated by the United States, Surveyor General for Idaho as Survey No. 615.

5. That complainant has an estate of inheritance in said mine and claim to the extent of one undivided eighth interest in the fee thereof; and has owned said interest since prior to April 30, 1898. That the defendant Empire State-Idaho Mining and Developing Company since 1898 has been and is now the owner of seven undivided eighths of said mine and claim.

6. That the said mine and mining claim are valuable solely for the ores therein contained and said ores are found at great depth and are reached only by two tunnels, one known as the Sweeny tunnel, and the other as the Arizona tunnel. That each of said tunnels has its portal in ground owned exclusively by said defendant Empire State-Idaho Company, and the part of each of said tunnels outside of the Skookum is in the exclusive control of the defendant, and those claiming under said defendant, and is not under the control of complainant.

7. That the defendant the Federal Mining and Smelting Company claims some interest or right in said mine and claim by or through the defendant Empire State-Idaho Mining and Developing Company, the exact nature and extent of which claim of interest or right is unknown to complainant and he cannot set forth the nature of said claim or right; but whatever right said defendants or
3 either of them have or has in and to said undivided seven eighths interest is subject to the liens hereinafter referred to; and was acquired with full knowledge of the rights of complainant in and to said property.

8. That prior to May 17, 1902, the defendant Empire State-Idaho Mining and Developing Company extracted from said mine through said tunnels large quantities of ore and sold the same and received all of the proceeds thereof and paid no part of the same to complainant; that complainant brought suit on March 19, 1899 in the United States Circuit Court, District of Idaho—(a court having jurisdiction of the parties and subject matter) against said defendant and Charles Sweeny and F. Lewis Clark, to recover his share of the proceeds and to quiet his title to said mine and ore bodies; and in said suit recovered a decree against said defendant Empire State-Idaho Mining & Developing Company, duly given and made in said United States Circuit Court at Moscow, Idaho, on or about November 17, 1902, for the sum of One Hundred Seventy-Five Thousand Dollars ($175,000), and which decree quieted the title of this complainant to said one eighth interest in said claim and ore bodies; a certified and attested copy of which decree was on the — day of November, 1902, recorded in Shoshone County, Idaho, and the amount decreed to complainant therein remains unpaid and unsatisfied excepting the sum of $5523.42; that as the result of an appeal from said decree by complainant the same was on the tenth day of May, 1904, so modified as to make the amount, thereof $255,061.40 with interest thereon from February 15, until paid at seven per cent per annum, and the said amount and every part thereof is now unpaid.

9. That subsequent to May 17, 1902, and prior to September, 15, 1903, the Empire State-Idaho Company defendant extracted from said Skookum mine and claim and sold ores greatly in excess of its proportion and exceeding in value the sum of Nine Hundred Thousand Dollars, and appropriated the entire amount to its own use and has refused to pay complainant his proportion therof which is now due and unpaid and constitutes a lien upon the undivided
4 seven eights interest; that from May 17, 1902, until the present time said defendant Empire State Company, and

ever since its organization the Federal Company have and each has denied the title of complainant to the said mine and ore bodies and have denied his right to mine said ores.

10. That since September 1st, 1903, the defendants have extracted from the Skookum mine ores greatly in excess of their proportion and exceeding in value the sum of One Million Dollars and have appropriated the same to their own exclusive use and have not paid complainant any portion thereof, and his proportion constitutes a lien upon said undivided seven eighths interest.

11. That said mine still contains ore of value, but the same is being rapidly exhausted by said defendants. That the mining thereof is being conducted in an unminer-like manner and no development work is being done in said mine. That said ores are being mixed with ores of lesser value from other properties before sale for the purpose of and actually rendering it difficult to determine the amount or value of the ore taken from said Skookum, and the cost of mining the ores; and said ores are being sold by said defendants and no part of the proceeds is being paid to complainant; but defendants are carrying such proceeds out of the State and distributing the same among many of their corporate stockholders and the creditors of said companies. That said defendant Empire State-Company, is, as complainant is informed and believes, insolvent and is attempting to conceal its property. That unless the defendants are enjoined and restrained from taking the ores the complainant will be required to bring numerous actions for the determination of the amount he is entitled to from time to time by reason of such acts of defendants which are continuing on their part. Therefore, complainant brings this suit in equity in order to avoid a multiplicity of suits in the premises; and by reason of the acts of the defendants and their threatened continuance, complainant has suffered and will suffer great and irreparable injury and damage unless defendants are enjoined from further continuance of their acts as prayed for; that the amount for which complainant has a lien upon the property as aforesaid, exceeds the present value of the property.

12. That plaintiff's interest in said mine exceeds in value the sum of Two-Thousand Dollars ($2,000), and the amount in controversy herein exclusive of interest and costs exceeds in value the sum of Two Thousand Dollars ($2,000).

13. That plaintiff has demanded of defendants that they account to and pay him his share of such proceeds, but such demand has been refused; and an accounting is necessary to determine the amount received from the sale of ore from said mine since May 17, 1898, and to determine the exact amount due complainant as his proportion thereof; that the accounts are so complicated that a Court of law could not adequately deal with the same.

Wherefore, complainant prays:

That defendants may be compelled to answer all and singular the allegations in this bill, but not under oath (answer under oath being expressly waived), and that relief be ordered and decreed as follows:

1. That the Court issue an injunction *pendente lite* restraining de-

fendants and each of them and their officers and agents from extracting any ore from said Skookum mine or claim during the pendency of this suit, or until defendants shall have accounted to and paid complainant the value of his proportion of the ores removed and upon final decree that the injunction be made permanent.

2. That an accounting be ordered of all ores extracted from said mine and claim and sold by defendants and each of them since May 17, 1902, and that complainant be awarded a decree for the value of his proportion of such ores.

And complainant prays for such other and further relief
6 as seems meet and equitable and for costs.

M. A. FOLSOM,
Solicitor and Counsel for Complainant.

JOHN R. McBRIDE, *Of Counsel.*

STATE OF WASHINGTON, *County of Spokane, ss:*

Kennedy J. Hanley being first duly sworn, deposes and says: that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except such matters as are stated on information and belief, and as to such matters he believes it to be true.

KENNEDY J. HANLEY.

Subscribed and sworn to before me this 28th day of June, 1904.
[SEAL.] ALBERT G. STARKEY,
Notary Public in and for the State of Washington, residing at Spokane, Washington.

7 Endorsed: No. 326. In the United States Circuit Court, for the District of Idaho, Northern Division. Kennedy J. Hanley, Plaintiff, *vs.* Empire State-Idaho Co., *et al.*, Defendants. Complaint. Filed July 27th, 1904. A. L. Richardson, Clerk. M. A. Folsom, Attorney for Complainant, Empire State Bldg. Spokane, Wash.

8 In the Circuit Court of the United States for the Northern Division of the District of Idaho.

No. 326. In Equity.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, and the FEDERAL MINING AND SMELTING COMPANY, Defendants.

Subpœna ad Respondendum.

The President of the United States of America to Empire State-Idaho Mining and Developing Company, and the Federal Mining and Smelting Company, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the Court Room

thereof, in Moscow, in said District, on the first Monday of September next, which will be the fifth day of September A. D. 1904, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Kennedy J. Hanley is complainant and you are defendants and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief [SEAL.] Justice of the Supreme Court of the United States, and the Seal of our said Circuit Court, affixed at Boise in said District, this 27th day of July, in the year of our Lord One Thousand Nine Hundred and Four and of the Independence of the United States the One Hundred and twenty-eighth.

A. L. RICHARDSON, *Clerk.*

By —— ——.

Memorandum pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The Defendant is to enter his appearance in the above entitled suit in the Office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso.*

[Endorsed.] No. 326. In the Circuit Court of the United States for the Northern Division of the District of Idaho. In equity. Kennedy J. Hanley *vs.* Empire State-Idaho M. & D. Co., *et al.*, *Subpœna ad Respondendum.* Returned and Filed, Aug. 6, 1904, A. L. Richardson, Clerk. By —— ——.

8½ UNITED STATES OF AMERICA, *District of Idaho, ss:*

Office of Deputy U. S. Marshal, Northern Division of Said District.

I hereby certify that I received the annexed *Subpœna ad Respondendum* on the 29th day of July, 1904, at Rathdrum, Idaho, and personally served the same upon John P. Gray legal Representative of the Federal Mining and Smelting Company, and W. H. North legal Representative of the Empire State-Idaho Mining and Developing Company, by handing to and leaving with the said John P. Gray and W. H. North, severally at Wallace, Shoshone County, State of Idaho, on the 1st day of August, 1904 a full and true copy of said *Subpœna ad Respondendum* duly certified to be such true copy by the Clerk of the U. S. Circuit Court for the Northern Division, District of Idaho, and I further certify the said John P. Gray and W. H. North, so served are the legal Representatives of the Federal Mining and Smelting Company and Empire

State-Idaho Mining and Developing Company, respectively in the State of Idaho, the parties named in the body of said *Subpœna ad Respondendum.*

R. ROUNDS,
U. S. Marshal for Idaho.
By LOUIS D. SCHATTNER, *Deputy.*

9 *Demurrer of Federal Mining & Smelting Co.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and the FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Demurrer.

This defendant, the Federal Mining and Smelting Company, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer says:

1. That it appears upon the face of the said bill that the complainant has an adequate remedy at law.

2. That the complainant has not in or by the said bill made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought or prayed for, from or against this defendant.

3. That it appears by the said bill that the same is exhibited against the defendant and the other party therein named as defendant thereto for distinct matters and causes, in several whereof, as appears by the said bill this defendant is not in any manner interested or concerned and that this bill is altogether multifarious.

Wherefore this defendant prays judgment whether it shall be compelled to make any further answer to the said bill or to any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in its behalf sustained.

10 GEORGE TURNER,
F. T. POST,
Solicitors of Counsel for Defendant, Spokane, Washington.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

F. T. POST,
Of Counsel for Defendant.

STATE OF WASHINGTON, *County of Spokane, ss:*

F. T. Post, being first duly sworn, on his oath deposes and says: That he is solicitor of the defendant Federal Mining and Smelting Company, and that the foregoing is not interposed for delay.

F. T. POST.

Subscribed and sworn to before me this 5th day of September, A. D. 1904.

[SEAL.] A. E. RUSSELL,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

11 Endorsed: No. 326. In the Circuit Court of the United States, for the Northern Division District of Idaho. Kennedy J. Hanley, Complainant, *vs.* Empire State-Idaho Mining and Developing Co. *et al.*, Defendant*d*. Demurrer of Federal Mining & Smelting Co., Filed Sept. 7th, 1904. A. L. Richardson, Clerk.

12 *Demurrer of Empire State Co.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and the FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Demurrer.

This defendant, the Empire State-Idaho Mining and Developing Company, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and from as the same are therein set forth, and alleged, demurs to the said bill and for cause of demurrer says:

1. That it appears upon the face of the said bill that the complainant has an adequate remedy at law.

2. That the complainant has not in or by the said bill made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought or prayed for from or against this defendant.

3. That it appears by the said bill that the same is exhibited against the defendant, and the other party therein named as defendant thereto, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned and that this bill is altogether multifarious.

13 Wherefore this defendant prays judgment whether it shall be com*ep*lled to make any further answer to the said bill or to

any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in its behalf sustained.

GEORGE TURNER,
F. T. POST,
Solicitors of Counsel for Defendant, Spokane, Washington.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

F. T. POST,
Of Counsel for Defendant.

STATE OF WASHINGTON, *County of Spokane, ss:*

F. T. Post, being first duly sworn, on his oath deposes and says: That he is solicitor of the defendant Empire State-Idaho Mining and Developing Company, and that the foregoing demurrer is not interposed for delay.

F. T. POST.

Subscribed and sworn to before me this 5th day of September, A. D. 1904.

[SEAL.] A. E. RUSSELL,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

14 Endorsed: No. 326. In the Circuit Court of the United States for the District of Idaho Northern Division. Kennedy J. Hanley, Complainant, *vs.* Empire State-Idaho Mining & Developing Company *et al.*, Defendants. Demurrer of Empire State Co. Filed Sept 7th, 1904. A. L. Richardson, Clerk.

15 *Præcipe to Set Demurrer for Hearing.*

M. A. Folsom, Lawyer, Spokane, Washington, Empire State Building.

SPOKANE, WASH., *Oct.* 3, 1904.

A. L. Richardson, Clerk, Boise, Idaho.

DEAR SIR: Please set down for argument the two demurrers in the case of Hanley *v.* Empire State *et al.*, No. 326. Same should be set down for hearing on the next term of court for Northern Idaho.

Very truly yours, M. A. FOLSOM.

Endorsed: Filed Oct. *Oct.* 7th, 1904, A. L. Richardson, Clerk.

16 *Order Setting Demurrer for Hearing.*

In the U. S. Circuit Court, Northern Division, District of Idaho.

No. 326.

KENNEDY J. HANLEY
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING CO. ET AL.

In accordance with the written direction filed by Counsel for complainant herein, it is ordered that the Demurrer of the Empire State-Idaho M. & D. Co. and the Demurrer of the Federal Mining Co., each to the Bill of Complaint in the above entitled action be and the same are hereby set down for hearing at Moscow, Idaho, on the 10th day of November, 1904, at 10 o'clock A. M. of said day or as soon thereafter as Counsel can be heard.

A. L. RICHARDSON, *Clerk.*

Oct. 7th, 1904.

17 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley *vs.* Empire State-Idaho M. & D. Co. *et al.* Order Setting Demurrer for Hearing. Filed Oct. 7th, 1904. A. L. Richardson, Clerk.

18 *Opinion.*

In the Circuit Court of the United States for the District of Idaho.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY ET AL., Defendants.

M. A. Folsom, for complainant,
Geo. Turner & F. T. Post, for defendants.

The demurrer to the complaint is not well taken. An action of ejectment as suggested by defendants would not lie, as it appears by the complaint that both parties are in possession, nor could complainant by any kind of a legal action obtain what is asked by this action. The legal remedy must be invoked only when it is as plain and adequate, as is practicable and efficient as the equitable. The allegations constitute both defendants proper parties, also they show the necessity of an accounting.

The demurrer is overruled.

Complainant's counsel asks in a brief, which has been served upon opposing counsel, that the date September 15, 1902, occur-ing in the first line of the 9 paragraph of the complaint, be changed by the Clerk, in the original complaint, to September 15, 1903.

It is so ordered.

Boise, Idaho, June 8, 1905.

BEATTY, *Judge.*

19 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley *vs.* Empire State-Idaho Mining & D. Co. *et al.* Opinion. Filed June 8, 1905. A. L. Richardson, Clerk.

20 *Order Overruling Demurrer.*

At a stated term of the Circuit Court of the United States, for the District of Idaho, Central Division, held at Boise, Idaho, on June 8th, 1905.

Present: Hon. Jas. H. Beatty, Judge.

No. 326. Northern Division.

KENNEDY J. HANLEY
vs.
EMPIRE STATE–IDAHO M. & D. CO. ET AL.

On this day was announced the decision of the Court upon the demurrer to the complaint herein heretofore submitted, (which decision is in writing and on file in said cause). Ordered that said demurrer be and the same is hereby overruled, and ordered that the date September 15–1902, occurring in the first line of the 9th paragraph of the complaint be changed by the Clerk in the original complaint to September 15–1903.

21 *Answer.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE–IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Answer of Defendants to Bill of Complaint.

These defendants, respectively, now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or *amy* be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much thereof as these defendants are advised that it is material or necessary for them to make answer thereto, severally answering say:

1. They admit that the complainant is a citizen and resident of the State of Idaho, residing at or near Wardner; and that the de-

fendant Empire State-Idaho Mining and Developing Company, is a corporation organized under the laws of the State of New York, and has an agent in the State of Idaho; and that the defendant Federal Mining and Smelting Company is a corporation organized under the Laws of the State of Delaware, having an agent in the State of Idaho.

22 2. In respect to paragraphs Four (4) and Five (5) of the bill of complaint, they admit that there is situate in Yreka Mining District, Shoshone County, Idaho, a mining claim known as the Skookum lode mining claim, and that the same was duly patented under the laws of the United States, and they admit that prior to September 1, 1903, for several years, the defendant Empire State-Idaho Mining and Developing Company was in possession of said mining claim, and that since that time the defendant Federal Mining and Smelting Company has been and is in possession thereof, and that at all times prior to the conveyance by said Empire State-Idaho Mining and Developing Company to the Federal Mining and Smelting Company, which was made on or about December 1, 1904, the Empire State-Idaho Mining and Developing Company was the owner of at least an individed seven-eighths (7/8) interest in said mining claim, and since the time of said conveyance the Federal Mining and Smelting Company has been the owner of all interests theretofore owned by the Empire State-Idaho Mining and Developing Company, and they admit that it was adjudged in the action referred to in paragraph Eight (8) of the bill, that the complainant is the owner of an undivided one-eighth (1/8) interest in said mining claim, and that he was such owned from April 30, 1898, and they deny that it was adjudged or could be adjudged in said case, or that in fact the complainant was the owner of an undivided one-eighth, or any other, interest in and to the ore bodies lying beneath the surface of the Skookum mining claim, and allege the fact to be that the complainant is not now and never was the owner of any of the ore bodies referred to in the bill in this action, but that at all of said times the said ore bodies were owned exclusively by defendant Empire State-Idaho Mining and Developing Company until the deed of conveyance aforesaid to this defendant Federal Mining and Smelting Company since which time they have been the exclusive property of said defendant.

23 3. That none of said ore bodies belong to any vein or ledge having its apex within the Skookum Mining Claim, but all of said ore bodies extracted from beneath the surface of the Skookum Mining Claim belong to a vein or ledge having its apex within the San Carlos lode mining claim lying to the North of the Skookum claim and were a part of the San Carlos claim; that said San Carlos lode mining claim was located on the 23rd day of April, 1886, under the Federal Statutes, in the manner provided by law and thereafter duly patented under said statutes; that it has parallel end lines and that said vein or lode passed through both end lines upon its course or strike and said vein or lode passed Southerly on its downward course out of and indefinitely beyond a vertic*le* plane drawn through the Southerly side line of the Viola claim, and all of the ore bodies in

question herein form a part of said vein or lode and lying within the end lines of said San Carlos claim extended Southerly in their own direction; that all of said ore bodies were and are the property of these defendants by virtue of their ownership of the San Carlos claim as aforesaid, and the complainant had no right, title or interest therein.

4. Defendants further answering say that this Court, in the action referred to in paragraph eighth of the bill, had no jurisdiction to determine title to the ore bodies lying within or beneath the Skookum mining claim for the reason that the bill of complaint in the said action does not purport to be an action to quiet title to such ore bodies, nor does the same make a case for the quieting of title thereto, nor is it such as to authorize the decree rendered in said action purporting to quiet the title to said ore bodies, and for the further reason, alleged by defendants to be a fact, that no opportunity was given to the defendants therein to litigate the title to said ore bodies before the decree in said action purporting to quiet title was rendered, and for the further reason that at the time of the commencement of said action, the defendant herein Empire State-Idaho Mining and Developing Company, was, as shown by the complaint therein, in exclusive possession of such ore bodies and the
24 complainant was out of possession thereof, and an action at law alone would lie in the Federal Court to determine title to such ore bodies, and that the defendant therein being the defendant Empire State—Idaho Mining and Developing Company, had a right under the Constitution and Laws of the United States to a trial by jury of the question of title to said ore bodies and defendants allege that so much of the decree in said action as undertook or purported to quiet title to such ore bodies was and is absolutely void as to the Empire State-Idaho Mining and Developing Company, because the same constituted and attempted to deprive it of its property without due process of law within the meaning of Article 5 of the Amendments to the Constitution of the United States, and because the same constituted an adjudication of its property rights without its consent by the Court without a jury, contrary to the provisions of Article Seven of the Amendments to the Constitution of the United States.

5. Further answering these defendants say that while it is true that an undivided eighth interest in said Skookum Mining claim stands of record in the name of this complainant, he is not in fact the owner thereof and has never been the owner thereof, but at all of the times referred to in the complant he was a mere naked trustee thereof for the Chemung Mining Company, a corporation, and that the latter is the real owner of the same, and this action is not brought with the consent or approval of said Chemung Mining Company; that said Chemung Mining Company has heretofore, and before the commencement of this action, brought an action in the District Court of the First Judicial District of the State of Idaho, against this complainant to compel this complainant to convey said undivided one-eighth (1/8) interest in said claim to said Chemung Mining Company and to have it adjudicated that he has no right, title or

interest therein and that he holds the same as trustee for said Chemung Mining Company, and to have it further adjudicated that said Chemung Mining Company shall have the full control over
25 said interest, and of all claims and demands against these defendants or any other party arising out of the same.

6. Answering paragraph Sixth of the bill, these defendants say that it is not true that the sole value of said mining claim consists of the ores lying therein, but it is true that said ores are found at great depth, which is due to the fact that they belong to a ledge having its apex outside of and several hundred feet North of the North boundary line of the Skookum mining claim and in the San Carlos lode mining claim as hereinbefore alleged. It is true that these ore bodies are reached only by two tunnels as alleged in paragraph Sixth of the bill, and that the portals of these tunnels are in ground owned by these defendants, but it is not true that the complainant has not had access to said ore bodies and the privilege of going through said tunnels for the purpose of examination and inspection of said ore bodies and of all mining operations therein, but the fact is that ever since May 17th, 1902, and for some time prior thereto, this complainant has had full access and means of access to said ore bodies through either or both of said tunnels and full opportunity to inspect and examine the same and all mining operations therein.

7. Answering paragraph Seventh of the bill, these defendants allege that they have heretofore set forth the interests of the defendant, Federal Mining and Smelting Company, and deny that the interests of these defendants, or either of them, in and to said Skookum Mining Claim are subject to any liens whatsoever on the part of the complainant; and further deny that the defendants, Federal Mining and Smelting Company, acquired said Skookum claim with the knowledge that the complainant had any right, title or interest whatsoever in or to said property, or any part thereof.

8. Answering paragraph Eighth of the bill, these defendants admit that an action was brought against the parties named in paragraph eighth of the bill, but deny that said action was to quiet title to said ore bodies, or that the decree therein did in fact quiet
26 title to said ore bodies or an undivided one-eighth interest therein in the complainant, and allege further concerning said decree in said action that they have hereinbefore fully answered.

9. Answering paragraphs Ninth and Tenth of the bill of complaint these defendants allege that between May 17, 1902, and March 1, 1903, no ore whatsover was extracted from beneath the surface of the Skookum Mining Claim, or from the Skookum mine or Skookum claim, and that between March 1, 1903, and September 1, 1903, ore was extracted by the defendant Empire State-Idaho Mining and Developing Company from beneath the surface of the Skookum claim in the ledge or vein having its apex in and belonging to, and being a part of the San Carlos claim, the exclusive property of said defendant Empire State-Idaho Mining and Developing Company, as heretofore alleged; that all of said ore so extracted was sold to smelters at the highest market price therefor, and said defendant realized out of the same over and above the cost of freight and treatment,

hauling and sampling, of labor, supplies and other expenses necessarily incurred in the mining of said ores and in the course of the business connected therewith, all of which expenses were fair and reasonable, the sum of Three Hundred and Seventy-seven Thousand Three Hundred and Four and Seventy-eight hundredths Dollars ($377,304.78); that since September 1, 1903, and up to June 1, 1905, the defendant Federal Mining and Smelting Company has extracted ores from beneath the Skookum claim lying within the San Carlos ledge as aforesaid, the exclusive property of said defendant as aforesaid, and the other defendant has extracted no ore therefrom during said time; that the defendant Federal Mining and Smelting Company has sold the same thus extracted to smelters at the highest market price and has realized out of the same over and above the cost of freight and treatment, of hauling and sampling, of labor, supplies and other expenses necessarily incurred in mining and in the course of said business, all of which expenses were reasonable, fair and just, the sum of Four Hundred and Forty-two Thousand One Hundred and Fifty-nine and Eighty-one Hun-
27 dredths Dollars ($442,159.81); that said defendant has been mining in said ledge beneath the surface of the Skookum claim since June 1, 1905, but is unable at this time to furnish the figures of the net amounts realized therefrom, but will hereafter file statements thereof; that one-eighth of said profits or net proceeds has been by said defendants deposited in bank in its own name on account of the litigation mentioned in paragraph Eighth of the bill and of the probability of this action being instituted and the pendency thereof and the order of Court herein, except that since the order of Court made herein concerning said profits said order has been in all respects complied with; that during none of said times has the complainant been denied access to said mining claims or to said ore bodies, or the right to inspect or examine the same, nor the right to ascertain in all possible way the mining operations carried on by these defendants and the amounts received from the sales of ores and the expense of operations, but from time to time upon demand of complainant these defendants have without prejudice furnished the complainant with a statement showing all matters and things inquired of by him, and these defendants deny each and every other allegation contained in paragraph- Ninth and Tenth of the bill not hereinbefore fully answered or adverted to.

10. Answering paragraph Eleventh of the bill, these defendants state that it is not true that mining is being conducted in an unminerlike manner and it is not true that development work is not being done, nor is it true that ores are being mixed with ore of lessor value, nor that it is difficult to determine the amount or value of the ore taken involved in this cause; nor is it difficult to determine the cost of mining same; nor is it true that the Empire State-Idaho Mining and Developing Company is insolvent or attempting to conceal its property, and these defendants generally deny each and every other allegation contained in paragraph Eleventh of the bill.

11. Answering paragraphs Twelfth and Thirteenth of the
28 bill these defendants specifically deny each and every allegation therein contained.

Wherefore, These defendants having fully answered, confessed, traversed, avoided or denied all the matters in said bill of complaint material to be answered according to their best knowledge and belief, humbly prays this Honorable Court to enter its decree and these defendants be hence dismissed with their reasonable costs and charges, and for such other and further relief as may be in accordance with equity.

GEORGE TURNER,
F. T. POST,
Attorneys for Defendants.

29 STATE OF WASHINGTON, *County of Spokane, ss:*

Bruce Clendening, being first duly sworn, deposes and says that he is an officer of each of the defendants herein, being the Treasurer thereof; that he has read the foregoing answer; knows the contents thereof, and that the same is true as he verily believes.

BRUCE CLENDENING.

Subscribed and sworn to before me this 1st day of July, 1905.

[SEAL.] THOMAS B. HIGGINS,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

30 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho, M. & D. Co., *et al.,* Answer. Filed July 3, 1905. A. L. Richardson, Clerk.

31 *Stipulation.*

In the United States Circuit Court for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY and THE FEDERAL MINING AND SMELTING CO., Defendants.

Stipulation.

It is hereby stipulated between the parties above named that the complainant may have, and he is hereby given, until August 25th within which to serve and file a replication to the answer, or to amend his complaint, except to the answer, or make any motion, or take any proceedings against the answer that he may be advised.

GEO. TURNER,
F. T. POST,
Solicitors and Counsel for Defendants.
M. A. FOLSOM,
Solicitor and Counsel for Plaintiff.

Dated August 7th, 1905.

32 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.*, Stipulation. Filed Aug. 23rd, 1905. A. L. Richardson, Clerk.

33 *Stipulation.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,

vs.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Stipulation.

It is hereby stipulated between the complainant and the defendants in the above entitled cause, that the defendants may amend their answer heretofore filed in said cause, and that said amended answer shall be substituted for and take the place of the original answer.

Dated this 25th day of October, 1905.

M. A. FOLSOM,
Solicitor for Complainant.
GEORGE TURNER,
Solicitor for Defendants.

34 Endorsed: No. 326. In the Circuit Court of the United States for the District of Idaho, Northern Division. Kennedy J. Hanley, Plaintiff, *vs.* Empire State-Idaho Mining and Developing Company, Federal M. & S. Co., Defendants. Stipulation. Filed Oct. 27th, 1905. A. L. Richardson, Clerk. M. A. Folsom, Attorney for Complainant, Empire State Building, Spokane, Washington.

35 *Amended Answer.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Amended Answer of Defendants to Bill of Complaint.

These defendants, respectively, now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much thereof as these defendants are advised that it is material or necessary for them to make answer thereto, severally answering say:

1. They admit that the complainant is a citizen and resident of the State of Idaho, residing at or near Wardner; and that the defendant Empire State-Idaho Mining and Deveoping Company is a corporation organized under the laws of the State of New York, and has an agent in the State of Idaho; and that the defendant Federal Mining and Smelting Company is a corporation organized under the laws of the State of Delaware, having an agent in the State of Idaho.

2. In respect to paragraphs Four (4) and Five (5) of the
36 bill of complaint, they admit that there is situated in Yreka Mining District, Shoshone County, Idaho, a mining claim known as the Skookum lode mining claim, and that the same was duly patented under the laws of the United States, and they admit that prior to September 1, 1903, for several years, the defendant Empire State-Idaho Mining and Developing Company was in possession of said mining claim, and that since that time the defendant Federal Mining and Smelting Company has been and is in possession thereof, and that at all times prior to the conveyance by said Empire State-Idaho Mining and Developin*h* Company to the Federal Mining and Smelting Company, which was made on or about December 1, 1904, the Empire State-Idaho Mining and Developing Company was the owner of at least an undivided seven-eighths (⅞) interest in said mining claim, and since the time of said conveyance the Federal Mining and Smelting Company has been the owner of all interests theretofore owned by the Empire State-Idaho Mining and Developing Company. They admit that a decree was rendered in the action referred to in paragraph 8 of the bill pretending to adjudge that the complainant was the owner of an undivided one-eighth (⅛) interest in said mine and mining claim and all ore bodies therein contained, and pretending to quiet his title to the same, and that he was such

owner from April 30, 1898, but they deny that said decree has any validity or force and effect as a decree quieting title, for the reasons hereinafter stated and alleged; and defendants allege the fact to be that the complainant is not now and never was the owner of any of the ore bodies referred to in the bill in this action, but that at all of said times the said ore bodies were owned exclusively by defendant Empire State-Idaho Mining and Developing Company until the deed of conveyance aforesaid to this defendant Federal Mining and Smelting Company, since which time they have been the exclusive property of said defendant.

3. That none of said ore bodies belong to any vein or ledge having its apex within the Skookum Mining Claim, but
37 all of said ore bodies extracted from beneath the surface of the Skookum mining claim belong to a vein or ledge having its apex within the San Carlos lode mining claim lying to the north of the Skookum claim and were a part of the San Carlos claim; that said San Carlos lode mining claim was located on the 23rd day of April, 1886, under the Federal Statutes, in the manner provided by law and thereafter duly patented under said statutes; that it has parallel end lines and that said vein or lode passed through both end lines upon its course or strike and said vein or lode passed southerly on its downward course out of and indefinitely beyond a vertical plane drawn through the southerly side line of the Viola claim, and all of the ore bodies in question herein form a part of said vein or lode and lying within the end lines of said San Carlos claim extend southerly in their own direction; and all of said ore bodies were and are the property of these defendants by virtue of their ownership of the said San Carlos claim, and the complainant had no right, title or interest therein.

4. Answering paragraph sixth of the bill, these defendants say that it is not true that the sole value of said mining claims consists of the ores lying therein, but it is true that said ores are found at great depth, which is due to the fact that they belong to a ledge having its apex outside of and several hundred feet north of the north boundary line of the Skookum mining claim, and in the San Carlos lode mining claim as hereinbefore alleged. It is true that these ore bodies are reached only by two tunnels as alleged in paragraph Sixth of the bill, and that the portals of these tunnels are in ground owned by these defendants, but it is not true that the complainant has not had access to said ore bodies and the privilege of going through said tunnels for the purpose of examination and inspection of said ore bodies and of all mining operations therein, but the fact is that ever since May 17, 1902, and for some time prior thereto, this complainant has had full access and means of access to said ore bodies through
38 either of both of said tunnels and full opportunity to inspect and examine the same and all mining operations therein. Defendants admit that they have during all the time herein mentioned, had exclusive control and direction of the workings of the said ore bodies underneath the Skookum claim, and that complainant has had no opportunity to work or permission to work the said ore bodies, but they allege that as the owners of the major interest in

the Skookum mine they were entitled, under the laws of Idaho, to control and direct the working of all ore bodies in said mine, subject to the right of minority owners to an accounting for ores so mined.

5. Answering paragraph Seventh of the bill, these defendants allege that they have heretofore set forth the interest of the defendant Federal Mining and Smelting Company, and deny that the interests of these defendants, or either of them, in and to said Skookum mining claim are subject to any liens whatsoever on the part of the complainant. But defendant, Federal Mining and Smelting Company, admits that it had notice that said complainant claimed to own an one-eighth interest in said Skookum mine and ores at the time that defendant acquired the same, but it was advised and believed that his claim was without merit, and as to said ores it is still advised and believes and insists that his claim was without merit.

6. Answering paragraph Eighth of the bill, these defendants admit that an action was brought against the parties named in said paragraph as alleged therein, but deny that said action was brought to quiet title to said ore bodies, or that the decree therein did in fact quiet title to said ore bodies or to an undivided one-eighth interest therein in the complainant, and allege further concerning said decree in said action that the Court, in the said action, had no jurisdiction to determine title to the said Skookum mine or to the ore bodies lying within or beneath the said mining claim, for the reason that
39 the bill of complaint in the said action does not purport to be an action to quiet title to the said mine or ore bodies, nor does the same make a case for the quieting of title thereto, nor is it such as to authorize the decree rendered in said action purporting to quiet the title to said mine and ore bodies, and for the further reason alleged by defendants to be a fact, that no opportunity was given to the defendants therein to litigate the title to said ore bodies before the decree in said action purportinf to quiet title was rendered, and for the further reason that at the time of the commencement of said action, the defendant herein Empire State-Idaho Mining and Developing Company was, as shown by the complaint herein, in exclusive possession of such ore bodies and the complainant was out of possession thereof, and an action of law alone would lie in the Federal Court to determine title to such ore bodies, and that the defendant therein, being the defendant Empire State-Idaho Mining and Developing Company, had a right under the laws and constitution of the United States to a trial by jury of the question of title to said ore bodies and defendants allege that so much of the decree in said action as undertook or purported to quiet title to such ore bodies was and is absolutely void as to the Empire State-Idaho Mining and Developing Company, because the same constituted and was in fact an attempt to deprive it of its property without due process of law within the meaning of Article 5 of the Amendments to the Constitution of the United States, and because the same constituted an adjudication of its property rights without its consent by the Court without a jury, contrary to the provisions of Article Seven of the Amendments to the Constitution of the United States.

7. The defendant- attach hereto marked Exhibit A, and pray that

the same may be taken as a part of this answer, copies of the complaint, answer and replication in the action referred to in the Eighth paragraph in the bill, and allege that the same constituted the sole pleadings in the said action, and together with the evidence
40 constituted the sole basis for the final decree rendered therein, a copy of which is attached hereto and marked Exhibit B, and made a part hereof; that after the replication in said cause was filed testimony was taken before an examiner, on the part of the complainant, in support of the allegations contained in the bill, to-wit, the allegations that the defendants, Clark and Sweeny, had acquired the one-eighth interest in the Skookum mine from the complainant by fraud, covin and deceit, and testimony was introduced by the defendants contradicting the testimony of the complainant, and tending to support the affirmative allegations of the answer, and no testimony was offered or taken, either for complainant or defendants, concerning the said one eighth interest, except the evidence for and against fraud, covin, and deceit, as before alleged. Thereupon the said cause was submitted to the Court for decision, and the said Circuit Court entered a decree in favor of the defendants therein. Thereupon complainant in that suit appealed to the United States Court of Appeals for the Ninth Circuit from the said decree, and the said court, after a hearing upon the pleadings and the evidence before it, found that the allegations of the bill relating to the fraud in procuring title to the one-eighth interest claimed by the said Hanley, were sustained by the evidence, and the decree was reversed and the cause sent back to the Circuit Court for the further proceedings in accordance with the opinion. Thereupon an order was made by the Circuit Court directing an accounting, and evidence was introduced by complainant to show the amount and value of ores extracted from the Skookum mine prior to May, 1902, by the defendants in said suit. That defendants in the said action thereupon offered to prove that the said ore so extracted from underneath the Skookum mine prior to that time was part of the vein having its apex in the said San Carlos claim, above referred to, owned by defendants, and that the said San Carlos claim was so located
41 that its extralateral rights included the ore bodies from which the said ores were extracted. The said offer to prove the said fact was thereupon denied by the said Court acting under the order of the United States Circuit Court of Appeals for the Ninth Circuit in a certain mandamus proceeding brought in said Court to test the question; that defendants in the said action thereafter, and at all times, contended and insisted that they had a right to show in the accounting that the ores taken from under the Skookum claim were a part of the vein apexing in the San Carlos claim, of which the defendants were the owners, and that the court was without jurisdiction to render a decree in the said action quieting title to the Skookum mine, or to the ore bodies referred to in the bill of complaint, but its contentions and objections were overruled and the decree averred by the complainant was rendered notwithstanding such protests and objections; and defendants aver that the said decree purporting to quiet title in said ore bodies was rendered with-

out evidence being taken upon the said contention of the defendants, and without any evidence whatever being heard which threw any light upon the contention; and said decree was thereafter, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, affirmed, the court in said cause holding as ground for its action, that the bill of complaint made a cause for quieting title to the one-eighth interest in the said Skookum mine and to the ore bodies in the limits thereof, and that the defendants in said cause, having failed to plead title to the ore bodies in themselves by virtue of the facts hereinbefore set up, were estopped to litigate the said facts.

Further answering paragraph 8 of the bill, these defendants say that the judgment for $255,061.40, with interest from February 15, 1903, set up and described in said paragraph, has, since the commencement of this suit, been fully paid, satisfied and discharged by the defendant, the Empire State-Idaho Mining and Developing Company, and the satisfaction thereof acknowledged by complainant and filed in the said Circuit Court.

42 Answering paragraphs Ninth and Tenth of the bill of complaint, these defendants allege that between May 17, 1902, and March 1, 1903, no ore whatsoever was extracted from beneath the surface of the Skookum mining claim, or from the Skookum mine or Skookum claim, and that between March 1, 1903, and September 1, 1903, ore was extracted by the defendant Empire State-Idaho Mining and Developing Company from beneath the surface of the Skookum claim in the ledge or vein having its apex in and belonging to, and being a part of the San Carlos claim, the exclusive property of said defendant Empire State-Idaho Mining and Developing Company, as heretofore alleged; that all of said ore so extracted was sold to smelters at the highest market price therefor, and said defendants realized out of the same over and above the cost of the freight and treatment, hauling and sampling, of labor, supplies and other expenses necessarily incurred in the mining of said ores and in the course of the business connected therewith, all of which expenses were fair and reasonable, the sum of three hundred and seventy-seven thousand three hundred and four and seventy-eight one hundredth- dollars ($377,304.78); that the ores of the net value of $377,304.78 admitted to have been extracted between the dates aforesaid, were extracted from month to month as follows: March, $58,914.81; April, $80,267.45; May, $74,676.72; June, $57,765.93; July, $48,943.52; August, $56,716.35. That since September 1, 1903, and up to October 1, 1905, the defendant Federal Mining And Smelting company has extracted ores from beneath the Skookum claim lying within the San Carlos ledge aforesaid, the exclusive property of the said defendant as aforesaid, and the other defendant has extracted no ore therefrom during said time; that the defendant Federal Mining and Smelting Company has sold the same thus extracted to smelters at the highest market price and has realized out of the same, over and above the costs of freight and treatment, of hauling and sampling, of labor, supplies and other expenses

necessarily incurred in mining and in the course of said
43 business, all of which expenses were reasonable, fair and just, the sum of Four Hundred and Fifty-four Thousand Nine Hundred and Seventy-eight and twenty-eight one hundredths ($454,978.28) Dollars; that the ores of the net value of $454,978.28, admitted to have been extracted between the dates aforesaid, were extracted from month to month as follows: During 1903, September, $53,574.36; October, $61,532.68; November, $46,590.98; December, $40,483.07; During 1904, January, $35,223.00; February, $42,607.26; March $17,537.16; April, $18,714.03; May, $19,612.70; June, $16,068.99; July, $22,754.48; August, $14,366.96; September, $5,579.29; October, $5,722.77; November, $5,116.35; December, $6,213.54; During 1905, January, $2,846.26; February, $6,889.10; March, $5,831.85; April, $9,562.80; May, $5,342.38; June, $2,657.25; July, $2,669.95; August, $4,066.45; September, $3,424.82; that one-eighth of said profits or net proceeds has been by said defendants deposited in bank in its own name on account of the litigation mentioned in paragraph Eighth of the bill and of the probability of this action be- instituted and the pendency thereof and the orderof the court herein,except that since the orderof court made herein concerning said profits said order has been in all respects complied with; that during none of said times has the complainant been denied access to said mining claims or to said ore bodies, or the right to inspect or examine the same, nor the right to ascertain in all possible ways the mining operations carried on by these defendants and the amounts received from the sales of ores and the expense of operation, but from time to time upon demand of complainant these defendants have without prejudice furnished the complainant with a statement showing all matters and things inquired of by him, and these defendants deny each and every other allegation contained in paragraphs Ninth and Tenth of the
43½ bill not hereinbefore fully answered or adverted to. But defendants admit that all the ores mined and disposed of, as admitted in this paragraph, were mined from beneath the surface of the said Skookum mining claim, and that if the decree pleaded by complainant in paragraph Eighth of the bill be a valid decree and have force and effect, to the extent of quieting title to said Skookum mining claim and the ores beneath the surface thereof, that the title of complainant to said ores was quieted and that he is entitled to have judgment for one-eighth of the net value thereof, as in this paragraph admitted. Defendants further admit that no part of the proceeds of the ore extracted from underneath the surface of the said Skookum claim, since March, 1903, has been paid the complainant Hanley.

9. Answering paragraph Eleventh of the bill, these defendants state that it is not true that mining is being conducted in an unminerlike manner and it is not true that development work is not being done, nor is it true that ores are being mixed with ores of lesser value, nor that it is difficult to determine the amount or value of the ore taken involved in this cause; nor is it difficult to determine the cost of mining same; nor is it true that the Empire State-Idaho

Mining and Developing Company is insolvent or attempting to conceal its property, and these defendants generally deny each and every other allegation contained in paragraph Eleventh of the bill.

10. Answering paragraph Twelfth of the bill, these defendants deny that the complainant's interest in the said mine exceeds in value the sum of Two Thousand Dollars, exclusive of interest and costs, but defendants admit that the amount in controversy therein, exclusive of interest and costs, exceeds in value the sum of two thousand dollars.

11. Answering paragraph Thirteenth of the bill, these defendants admit that complainant has demanded of defendants that
44 they account to and pay him his share of such proceeds, and admit that such demand for payment has been refused.

Wherefore, these defendants having fully, answered, confessed, traversed, avoided or denied all the matters in said bill of complaint material to be answered according to their best knowledge and belief, humbly pray this Honorable Court to enter its decree and these defendants be hence dismissed with their reasonable costs and charges, and for such other and further relief as may be in accordance with equity.

GEORGE TURNER,
F. T. POST,
Solicitors for Defendants.

Due and regular service of the foregoing Amended Answer admitted this 27th day of October, A. D. 1905.

M. A. FOLSOM,
Solicitor for Complainant.

45 EXHIBIT "A."

In the Circuit Court of the United States, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENEY, F. LEWIS CLARK and THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, Defendants.

Bill of Complaint.

To the Judges of the United State Circuit Court for the District of Idaho, Northern Division:

Comes now your orator, Kennedy J. Hanley, and hereby complaining alleges and shows:

That your orator is a citizen of the United States, and a resident and citizen of the State of Idaho, residing at Wardner Shoshone County, of said State.

That the said defendants Charles Sweeney and F. Lewis Clark, are each citizens and residents of the State of Washington, and that the

defendant, the Empire State-Idaho Mining and Development Company, named a defendant herein, is a corporation, organized and existing under the laws of the State of New York, and a citizen of said State of New York, and is engaged in carrying on business, as a corporation, at the town of Wardner, Yreka Mining District, Shoshone County, in the Northern Division, of said District of Idaho, by agents doing business in its name, and that the defendants Sweeney and Clark have been, and now are, officers of said corporation, and have been for a long time past.

46 That on the 30th day of April, 1898, your orator was, ever since has been, and now is, the owner of eleven twenty-fourths of certain mining ground lying in yreka Mining District in said Shoshone County, called the "Skookum" mining claim, for which patent has been issued by the United States, and under which patent rests the true source of all title to the same in its present claimants.

Your orator further shows to the Court that his right to a one-third interest of said "Skookum" is, briefly stated derived as follows:

That in the month of November, 1896, the estate of one David McElvey, deceased, was in the Probate Court of Shoshone County, Idaho, for settlement, and an administrator was in charge of the property of said estate which owned an undivided one-third interest in said "Skookum" mine.

That on the 30th day of November, 1896, after regular proceedings therein, the Probate Court aforesaid made and entered its judgment and decree to the effect that a necessity had been shown for the sale of said interest in said "Skookum" mine, as required by law, and directing that the administrator thereof should proceed according to the provisions of the State to offer said property to purchasers for bids thereon; said decree adjudicating a sale of said property was entered in the regular proceedings of said court on the 30th day of November, 1896, after a hearing thereon, as provided by law, a copy of which is hereto annexed, made a part hereof, and marked Exhibit "A."

That afterwards, and about the 1st day of June, 1897, your orator announced to said administrator that he bid for said interest, and would pay the sum of seven hundred and fifty dollars, ($750.00) therefor if said bid should prove to be the highest and best bid therefor, and said bid was afterwards reported to the Probate Court.

That afterwards, the said Administrator, on or about the
47 1st day of July, 1897, informed your orator that in response to his offer to receive bids for said interest in said "Skookum" mine he had received one offer of seven hundred dollars ($700.00) from *from* the Chemung Mining Company, and that the same was the only other bid, aside from your orator's, made therefor, and that the matter of whether your orator's offer should be accepted would be heard at some day during the July term of said Probate Court.

That your orator being then an owner of an interest in said "Skookum" mine, was desirous of acquring a further interest, and so informed said administrator, and further stated to him that he would pay more than seven hundred ($700.00), the amount of said Che-

mung bid, and would abide his bid of seven hundred and fifty dollars (-750.00).

That afterwards your orator was informed by said administrator that the hearing as to which of said offers would be accepted would be heard in the Probate Court on the 26th day of July, 1897, and invited your orator to be present at said hearing.

Your orator further stated that at the time when said bid was made in the name of the Chemung Mining Company your orator was a holder and owner of one hundred and twenty-five thousand (125,000) shares of its capital stock (one fourth of the whole), while the defendants Sweeny and Clark held and owned the remainder, three hundred seventy-five thousand (375,000) shares, less a few shares standing in the name of one Goodspeed, who was an employee in the office of said Sweeny and Clark; and the said Sweeny, Clark and Goodspeed constituted the board of trustees of said mining company, and were in exclusive charge of its books and business, at Spokane, Washington, under the laws of which State said company had been organized.

Further alleging, your orator shows that said mining company was without funds in its treasury, and *had at* the date of its said bid, nor at any date prior, nor on the 13th day of August, 1897, any money with which to make its alleged bid good, or any
48 bid whatever, nor had it ever or at any time authorized or directed said purchase of said "Skookum" interest to be made by any person whomsoever; and said pretended bid for purchase was a sham bid, made without authority and without means to make it good, and was a fraudulent devise intended to prevent any sale at the time; contrived by the defendants Sweeny and Clark, for purposes of their own, which will more fully appear hereafter.

That well knowing that said bid was not the bid in fact of the said Chemung Mining Company, and being willing to increase his own holdings in said "Skookum" mine, in pursuance of the invitation of said administrator to be be present on the 26th of July, 1897, for that purpose, your orator repaired to Murray, Idaho, and appeared in the Probate Court on said day, and there and then informed said administrator and said Probate Court that he was ready and willing to make his said bid good, and to pay for said one-third interest the sum of seven hundred and fifty dollars ($750.00) cash, the sa*id* being fifty dollars ($50.00) more than the pretended bid of the said Chemung Company.

That the said administrator and the said Probate Court then and there informed your orator that they expected still other bids from other parties, and that for the purpose of giving time to those expected bidders to arise, the judge of the Probate Court took a recess of his Court from 12 M. to 4 P. M. of said day; that at 4 P. M. there being no further bids, and the said Chemung Mining Company putting in no appearance, either by its attorney, A. G. Kearns, or by any person, nor making good its offer by the deposit of any money thereon, and your orator's offer of seven hundred fifty dollars ($750.00) being the highest bid and accompanied by the cash, and said Probate Court then and there confirmed said sale to your orator,

and directed the said administrator to accept the money, to-wit, seven hundred fifty dollars ($750.00), and execute a conveyance to your orator, all of which was then and there done, and your orator paid the price, received his deed, and placed the same on record.

49 And the said proceedings are fully verified by the decree entered on said date in said Probate Court, a copy of which is hereunto annexed, and made a part hereof and marked Exhibit "B," save and accept that in said decree it is recited that said "Kennedy J. Hanley having bid the sum of $700.00 for said undivided one-third interest," the same is accepted, whereas said recital is erroneous as to the amount bid and paid, which was seven hundred and fifty dollars ($750.00), as will be fully proved.

Further, your orator shows that about the 6th of October, 1897, he was informed by rumor that some proceeding had been had in said Probate Court, by which the title which had been conveyed to him in virtue of the proceeding theretofore had in said court on the said 26th day of July, was brought into question, and that said administrator had been ordered and directed by said Probate Court to make another conveyance of said interest in said mine to the said Chemung Mining Company, and had refused to comply with said directions to make said second conveyance, upon the ground that he had, under the decree of July 26th, 1897, conveyed all the title held by said estate therein, and would convey nothing further; thereupon the Chemung Mining Company brought its action of mandamus in the District Court of the First Judicial District in and for said County and State, to compel the said administrator to execute a conveyance to the said Chemung Mining Company ordered by the Probate Court, and then it was that your orator was advised of the proceedings which had been had in the Probate Court in the meantime, which proceedings were as follows: About the 13th of August, 1897, said Chemung Mining Company applied by its attorney, one A. G. Kearns, to the Judge of Probate Court of said County, to set aside and annul the decree of the Court of July 26th, 1897, confirming the sale of said one-third interest to your orator, and to declare said sale and conveyance void.

That said Probate Court, without any notice of said application to your orator, and without taking any proof in any form, and after the subject matter had passed out of its jurisdiction, and

50 without having any jurisdiction to set aside and cancel a conveyance or real estate, at any time, made and entered upon its record an order calling the same a "decree," to the effect that, "It appearing that on the 26th of July, 1897, an order was made by this court confirming the sale of said real estate (the undivided one-third of the "Skookum" lode mining claim) in one Kennedy J. Hanley, and directing said administrator to execute proper and legal conveyance thereof to said Hanley," etc. "And it appearing to the satisfaction of the Court that such order confirming the said sale in Kennedy J. Hanley was obtained by misrepresentation and fraud upon the part of the said Kennedy J. Hanley in pretending to represent the said Chemung Mining Company, and all

and singular the premises being by the court here seen, heard and considered:

Wherefore, it is ordered, adjudged and decreed, that the said order made herein, on the 26th day of July, 1897; confirming said sale in Kennedy J. Hanley, be, and the same is hereby vacated, set aside and annulled." And then the Court further proceeded to confirm a sale of said property to the Chemung Mining Company, and directed the administrator to execute a conveyance thereof to said company; all of which proceedings of August 13, 1897, were had without notice to your orator, and without any knowledge thereof on his part, without any proof of the fraud alleged as the grounds thereof, and without any beyond the jurisdiction of the Court to do the same, and was an attempt to deprive your orator of his property secretly, by an *ex parte* order after it had accepted and appropriated his money paid therefor, and without any deposit or payment by said Chemung Mining Company for said property.

That the proceeding in the District Court to compel the administrator to execute a conveyance under the last order above cited was had upon an *ex parte* showing made by the Chemung Mining Company, and the Court holding that it was the duty of the administrator to obey the orders of the Probate Court, required the said administrator to make said conveyance by a peremptory mandate to that effect, and upon appeal to the Supreme Court of Idaho this judg-
51 ment of the District Court was affirmed, and the claim and title of the defendants in this action to the ownership of this one-third interest in based solely and wholly upon the proceedings.

Your orator further states that at no time, either in the Probate Court proceedings above recited, after the 26th day of July, 1897, or in the proceedings of the District Court, was your orator's claims or rights ever investigated or presented, nor was he a party to any such proceedings, which were begun secretly in order to exclude him from any part therein, and prosecuted to that end, without lawful notice to him, or any attempt to make him a party in any way whatever.

And your orator alleges that the defendants, having procured these illegal and fraudulent proceedings to be taken, give out and proclaim that through them they have acquired title to the said interest, and that the pretended proceedings in the Probate Court, and the action taken by said Chemung Mining Company, constitute an adjudication of the same binding upon your orator, although he has never been a party thereto, nor have the real and true facts ever appeared in any of the proceedings.

And your orator alleged that the proceedings of said Probate Court, of date August 13, 1897, were without jurisdiction of either the subject matter or the parties in interest; that after the close of the July term of said Court it had no power or authority by law to set aside at the succeeding term of August 1897, the judgment and decree made at its former term, as was assumed to be done August 13, 1897, except by regular proceedings for that purpose, to which the parties hereto were entitled to notice, if it possessed any power whatever in that behalf, and all of the pretended proceedings of said date

were and are absolutely null and void, and the decree of said date is null and the proceedings thereunder totally void.

Your orator further shows that as to his undivided one-eighth interest in said "Skookum" claim, which, with the one-third aforesaid, makes his eleven twenty-fourths, your orator's
52 title was regularly derived through conveyance from the patentees of the Government of the United States.

Your orator further shows, as aforesaid, that on the said 30th day of April, 1898, your orator, after having deposited twenty-five thousand (25,000) shares being one-fifth of his holdings in the stock of said Chemung Mining Company, in the treasury of said company, was still the personal owner of one hundred thousand (100,000) shares of its capital stock, and that said company then owned, by conveyance to it, certain mining ground situated in Yreka Mining District, county of Shoshone, State of Idaho, consisting of the following mining claims; viz: The "Lily May", "Jersey Fraction", "Cariboo", "Good Luck", and "Butte", and your orator, who shortly before that date had been chosen a trustee of said corporation, and the defendants Sweeny and Clark, were officers and trustees of said company, and owned its capital stock.

That the said defendants Sweeny and Clark held the majority of the stock of said company, and at the time the contracts hereinafter alleged were entered into, were negotiating for the control of a number of other mineral claims lying about and adjoining the said "Skookum" mining claim, aforesaid, with the declared purpose of putting all said properties under one control, and for the organization of a single corporation to operate the same for sale or profit in working.

That said scheme embraced the acquisition of the title to the property held by the Chemung Company, also the claim hereinbefore referred to as the "Skookum", and a number of other adjacent and adjoining claims, covering an area of hundreds of acres of mineral lands of supposed great value.

That the interests held as aforesaid by your orator were of great importance to the successful launching of this proposed scheme, because said "Skookum" was surrounded by the other
53 claims which defendants Sweeny and Clark had acquired and were seeking to acquire for the purpose aforesaid, and they approached your orator with an offer to purchase all his stock in the Chemung Mining Company, and all his claims and interest on said "Skookum" ground.

And your orator shows that, owing to previous business transactions and relations with the said Sweeny and Clark, in which he had regarded them as having treated him with bad faith he was anxious to close out his interests and avoid all further business complications or dealings with them.

That pursuant to the negotiations referred to, on the 30th day of April, 1898, a contract was entered into by which your orator agreed to execute conveyance for the two interests he held and claimed in the said "Skookum" claim, to-wit, one for the one-eighth, and another conveyance for the one-third interest, and place the same in escrow

in the Exchange National Bank of Spokane, at the price of ten thousand dollars ($10,000.00) for the whole, it being distinctly understood and agreed that neither deed should be delivered without payment of the fixed price of ten thousand dollars ($10,000.00), and that upon its payment by said Sweeny and Clark, within the time specified, the envelope containing the two deeds should be delivered to said Sweeny and Clark, by the custodian thereof, E. J. Dyer, the cashier of said bank, and if not paid the same was to be returned to your orator.

That at the same time your orator and defendants Sweeny and Clark placed in a second envelope a certificate representing the one hundred thousand (100,000) shares of stock of said Chemung Mining Company, being all the stock held personally by your orator in said mining company, and placed the same in escrow, at the agreed price of twenty thousand dollars ($20,000.00) of which said sum the said Sweeny and Clark paid before the deposit of said escrow two thousand dollars ($2,000.00), the remaining eighteen thou-
54 sand Dollars ($18,000.00) to be paid as shown by the endorsement contained on the outside of said envelope, August 1st, 1898.

That the price of said stock agreed upon by the parties was twenty cents ($.20) per share, or twenty thousand dollars, ($20,000.00) for the stock, and ten thousand dollars ($10,000.00) for the interest in the "Skookum" claim, which sums were severally indorsed on the outside of said envelopes, as the price to be paid, by the defendants Sweeny and Clark, to entitle them to be taken up, save that upon the envelope containing the stock the indorsement required only eighteen thousand dollars ($18,000.00) to be paid, as said Sweeny and Clark before their deposit had paid two thousand dollars ($2,000.00), as above stated; and said two options were distinct, and either or both should be accepted or rejected.

That when the terms of said contracts were agreed to, the negotiations having been conducted between the said Clark on behalf of himself and his associates and your orator, the papers to evidence the same were prepared by the Clerk of said Sweeny and Clark, and the execution of the two deeds, one for the one-third interest and the other for the one-eighth interest in said "Skookum," instead of in a single instrument, was made at the instance of the said defendants, and at no suggestion of your orator, and the indorsements on the envelopes into which the papers were placed were written by the said clerk at the dictation of said Sweeny, no reference being made therein to the contents of said envelopes, as will be seen by inspection of the copies thereof, which are hereto annexed and made a part hereof, marked respectively Exhibit "C" and Exhibit "D."

And your orator shows that the envelopes containing (one) the two deeds to the said "Skookum" mining interests, the other, the certificate of stock, were then taken, unsealed, to the said bank in the hands of the defendant Sweeny, the acknowledgements
55 of said deeds being there taken by a notary, and the contents sealed and delivered to the custody of E. J. Dyer, the cashier of said bank.

That afterwards, at the request of the defendants Sweeny and Clark, and on the 7th day of June, 1898, your orator extended the time for payment on the envelope containing the deeds to the "Skookum" mining interests until the 20th day of September, 1898, and on the 7th day of June, 1898, made a like extension of the time for payment to be made upon the stock of the said Chemung Mining Company, the said Sweeny and Clark paying him at the said date the sum of two thousand dollars ($2,000.00), which your orator accepted as credit on the proposed purchase of stock, though no indorsement was made thereof on the said envelope.

Your orator further shows that on the 21st day of September, 1898, he called at the bank and found the following condition of facts: That the defendant Charles Sweeny, acting for himself and the said Clark, had deposited the sum of sixteen thousand dollars ($16,000.00), the balance of the price of said stock, to your orator's credit in said bank, and had taken, as he might lawfully do, the envelope containing the same; that the envelope in which had been placed the two deeds of the "Skookum" mining interest at the time the papers were signed had been opened and the deed to the one-third interest only remained therein, and the ten thousand dollars ($10,000.00) to be paid in order to have the contents of the said envelope, to-wit, the said two deeds, delivered to him and said Clark, had not, nor any part thereof, been paid; that nothing remained in said envelope to show who had taken said deed to one-eighth, nor could said custodian inform your orator what had become of the missing deed, and said Dyer informed your orator that no money had been paid on it, and that said Sweeny had not deposited anything on said escrow, and had declined to take it up; that it now
56 appears that said missing conveyance executed by your orator to said one-eighth interest has been placed on the records of said County of Shoshone, wherefore your orator charges and alleges:

That at some time between the 30th day of April, 1898, when said deed was placed in said envelope before being deposited with said Dyer as an escrow, and the 21st day of September, 1898, the same was extracted unlawfully and surreptitiously therefrom, and without the consent or knowledge of your orator, and without payment of the said sum of ten thousand dollars ($10,000.00), or any part thereof, and caused to be placed upon the records of said County of Shoshone the said deed fraudulently and in violation of said contract.

That during all the negotiations for the sale of your orator's interests in said "Skookum" claim, it was understood that the price fixed upon the same without any reference to the extent of his interests, and that your orator refused to negotiate or contract for the sale of the one-eighth interest only at any price, unless the whole should be included, and when the bargain resulting in the escrow of his said interest in the said "Skookum" claims was agreed to, it was with the explicit understanding and agreement that your orator's interests in the "Skookum" represented by the two conveyances executed by your orator to the defendants Sweeny and Clark were to go

as one single sale, and that it was separate and distinct from the stock escrow, and the two deeds were to be placed in a separate envelope for that reason; that your orator during all the negotiations, and at the time the contract was finally agreed to, refused to make any contract for the sale of any interest he claimed in the said "Skookum" claim, unless and except it should be for the whole of what he claimed, and that it should be separate and distinct from the contract for the sale of the Chemung stock; that the taking of this deed for the one-eighth interest from the possession of the said custodian was a gross and willful fraud, perpetrated without the knowledge of your orator, and was in defiance of the contract of the said
57 parties.

That through the said fraudulent means the said Sweeny and Clark have obtained an apparent title to the said one-eighth interest of said "Skookum" mine, in violation of their agreement to pay ten thousand dollars ($10,000) therefor, and without any consideration whatever, all of which is against right, justice, and good conscience.

Your orator further shows that the defendants Sweeny and Clark procured the agreement of your orator to sell his interests in the "Skookum" mine by covin and fraud, perpetrated in the following manner: That said "Skookum" mine had been reached for working purposes by certain workings known as Last Chance workings, which were in the exclusive control of said Sweeny and Clark, and which lie northeasterly of the "Skookum" claim; that they declared at the time of the agreement by which they took the option to purchase of your orator, that the works of the Last Chance mine and penetrated to the said "Skookum" claim, and that they knew that the ground was of little value, and that it contained no ore, and they being in the exclusive control of said workings, and said grounds could not be reached in any other way; they stated that they desired to purchase it, not because it was of any value for its ore, but because it was surrounded by other claims which were of value and would be useful to them for combining it for working purposes with the said other ground and give breadth, bulk and character to their plan to put the consolidation land on the market. That your orator had no means of personal knowledge as to the value of said ground, except its situation with reference to other claims of which he had some knowledge, and relying upon these representations of the defendants Sweeny and Clark, that they had not in their works penetrating said claim found any ore or ore body, and that they had no more information about the same than your orator, he fixed the price of his entire interest in said "Skookum" claim at ten thousand dollar*d* ($10,000.00).

And now your orator shows that the facts were: That the
57½ said works penetrating said "Skookum" ground had disclosed an immense body of ore of great value, and that the said Sweeny and Clark wilfully falsified and misstated the facts to your orator that they might procure said contract with him and defraud him into making the agreement to sell his said interests, well knowing that he was ignorant of the truth, while they wilfully

misstated the facts as aforesaid, which were well known to them at the time.

Your orator further shows that the ores contained in said "Skookum" mine are of such value that there has been taken out of said ore body then disclosed in said ground up to the present time ore to the value of not less than one hundred and fifty thousand dollars ($150,000.00) net, over and above the cost of mining, treating, extracting and marketing the same, of which your orator is entitled to the share represented by his interests in said "Skookum" mine heretofore set forth.

Your orator further shows that the defendants Sweeny and Clark, combining with other persons to your orator unknown save as disclosed by the records of said county of Shoshone, have organized under the laws of the State of New York, the corporation, defendants in this action, and since about the 15th day of May, 1898, said corporation defendant has been engaged in working and mining the ores contained as aforesaid in said "Skookum" mining claim, under the general supervision and direction of said Sweeny and Clark, who are, and always have been officers of said corporation, and own the majority of its said capital stock as your orator states upon information and belief. That said corporation had and has knowledge of the facts as to the frauds practiced by said Sweeny and Clark upon your orator, heretofore alleged, and it and said individual defendants are receiving the fruits thereof; and that the premises in controversy herein are of the value of more than ten thousand dollars ($10.000.00).

58 That the defendants herein give out and assert, since the record of said deed to said Sweeny and Clark to the one-eighth interest, that they own the "Skookum" claim, and that your orator has no interest therein; that they have many million dollars' worth of ore in sight therein, and that they intend to take the same to their own use; that said described property is of no value, except for the ore it contains, and that the defendants are rapidly exhausting the same to the utter destruction of your orator's right, for all of which wrongs in the past and threatened in the future your orator has no plain, speedy or adequate remedy at law, and only in a court of equity.

That said defendant company acting in conjunction with and under the direction of said Sweeny and Clark, are working a force of no less than one hundred miners and workmen in taking the ores of said ground, and despoiling it at the rate that will be destructive to your orator's interests therein, unless they are prevented by this court, which shall by proper order and process preserve the same until the parties hereto shall have a hearing upon the merits.

That the ore bodies of the said "Skookum" mine now being worked and despoiled by the said corporation defendant is approached by a tunnel, passing through the Last Chance Mining Claim, and penetrating the "Skookum" claim, called the "Sweeny Tunnel," and the same is in the possession and control of said defendants, and is the only approach to said workings in the "Skookum," and is held under lease executed by the Last Chance mining

Company, its owner, by its president, Charles Sweeny, one of the defendants herein, all of which was done by the authority of the corporation known as the Last Chance Mining Company, a corporation organized under the laws of the State of Washington, and owning the Last Chance mine and other property in Yreka Mining District, County of Shoshone, State of Idaho, including the Sweeny Tunnel, and the said lease also included that certain mill and concentrator for the concentration of ores for the market
59 from said mine, called the Last Chance Mine Concentrator, and said defendants are using the same in their said mining operations on said "Skookum" mine and have been during all the time referred to.

The said defendants claim an estate or interest in said undivided one-eighth interest in said "Skookum" claim adverse to your orator, which claim of said defendants is without any right whatever, and that said defendants have not any estate, right, title or interest whatever in said land and premises, or any part thereof, the property of your orator as aforesaid.

Wherefore, your orator prays:

First. That the said defendants, to-wit: Charles Sweeny, F. Lewis Clark and the Empire State-Idaho Mining and Developing Company, a corporation, may each be compelled to answer all and singular the matter set forth and stated in this bill, but not under oath (answer under oath being hereby expressly waived.).

Second. That this court appoint its receiver to take into his possession and control the said "Skookum" mine and workings, including the said Sweeny Tunnel, and the concentrating mill used therewith, and continue the operations in said mine, under such rules and directions as the Court may decree necessary for the preservation of the rights of your orator and those of the defendants, and that said defendants Clark and Sweeny and said Empire State-Idaho Mining and Developing Company, and each of them, be enjoined and prohibited by this court, and all and each of their agents, servants or employees, from in any wise working and extracting any ore therefrom pending the trial on the merits and until the final determination of the rights of the parties herein.

Third. That the conveyance by your orator to the defendants Sweeny and Clark be set aside and declared null and void from its date; that the defendants be held to account for your orator's share of the proceeds of said "Skookum" mine taken therefrom
60 by the said defendants since said escrow deeds were made to the present time.

Fourth. That said defendants may be required to set forth the nature of their claims to said premises, and that all adverse claims of the said defendants may be determined by decree of this Court; that by said decree it be declared and adjudged that the said defendants, and each of them, have no estate or interest whatever in or to said undivided interests of your orator in said "Skookum" claim, and that the title of your orator is good and valid thereto and therein.

Fifth. That said defendants, and each of them, be forever en-

joined and debarred from asserting any claim whatever in or to said undivided interest of said plaintiff in said "Skookum" claim adverse to your orator, and for such other preliminary and final relief as to this Honorable Court may seem meet and agreeable to equity and for his costs of suit.

Sixth. And your orator further prays that your Honors will grant unto your orator your writ of subpœnae, issuing out of and under the seal of this court and to the said defendants Charles Sweeny, F. Lewis Clark and said Empire State-Idaho Mining and Developing Company, commanding them, and each of them, by a certain day to appear before your Honors in the Court aforesaid and then and there answer these premises and abide the further order and direction of this Court herein.

JNO. R. McBRIDE,
Solicitor for Complainant.

C. W. BEALE,
Of Counsel.

61 STATE OF IDAHO, *County of Shoshone, ss:*

Kennedy J. Hanley, being first duly sworn, deposes and says that he is the complainant in the above-entitled action, and he has heard read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as — those matters therein stated upon information and belief, and as to those matters he believes it to be true.

KENNEDY J. HANLEY.

Subscribed and sworn to before me this 9th day of March, A. D. 1898.

(Stamp.)
[SEAL.]

H. M. DAVENPORT,
Notary Public.

62 *Answer.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY (a Corporation), Defendants.

Answer of the Above-named Defendants to the Bill of Complaint of Kennedy J. Hanley, Complainant Herein.

The defendants respectively, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as defendants

are advised it is material or necessary for them to make answer to, severally answering say:

That as to whether or not the complainant, Kennedy J. Hanley, is a citizen of the United States, defendants have not sufficient information upon which to base a belief, and therefore deny the same; admit that the said Hanley is a resident and citizen of the State of Idaho, residing at Wardner, Shoshone County, Idaho.

Admit that the defendants Charles Sweeny and F. Lewis Clark are each of them citizens of the United States and of the State of Washington, and residents of the said State of Washington. Admit that the said defendants Sweeny and Clark are officers of the Em-

63 pire State-Idaho Mining and Developing Company.

Deny that on the 30th day of April, 1898, or at any other time, the complainant was or ever has been, or now is, the owner of eleven twenty-fourths (11/24) of the said mining ground lying in the Yreka Mining District, in Shoshone County, Idaho, called the "Skookum" mining claim. Denies that the said complainant has or had at the time of the commencement of this action any title or interest, claim or right in or to the said "Skookum" mining claim, or any part thereof.

Admit that in the month of November, 1896, the estate of one David McKelvey, deceased, was in the Probate Court of Shoshone County, Idaho, for settlement, and that an administrator was in charge of the property of said estate, and that said estate owned an undivided one-third (1-3) interest in the said "Skookum" mining claim.

Admit that on the 30th day of November, 1896, after regular proceedings therein, the Probate Court of said Shoshone County, Idaho, made and entered its judgment and decree to the effect that a necessity has been shown to exist for the sale of the said interest of the said McKelvey, deceased, in the said "Skookum" mine, as requied by law, and that said Probate Judge directed that said administrator should proceed according to the provisions of the Statute, to offer said property to purchasers, for bids thereon, and that said Exhibit "A" attached to complainant's bill of complaint is a copy of the decree in the premises.

Deny that about the first day of June, 1897, or at any other time, complainant announced to the administrator that he bid for said interest in said "Skookum" mine, or would pay therefor the sum of seven hundred and fifty dollars, if said bid should prove to be the highest and best bid therefor, and that the said bid or any

64 bid of the complainant, was afterward or ever reported to the said Probate Court.

Deny that the said administrator on or about the first day of July, 1897, or at any other time, informed complainant that in response to his offer to receive bids for said interest in said "Skookum" mine, he had received an offer of seven hundred dollars *for* the Chemung Mining Company, and that the same was the only other bid aside from the complainants made therefor, or that the matter of whether the complainant's said alleged offer should be accepted would be

heard on some day or any day during the July term of the said Probate Court.

Deny that the complainant then owned an interest in the said "Skookum" mine, except as hereinafter stated and set forth, or that the complainant was desirous of acquiring any further interest therein, or that he so informed said administrator, or that he stated to said administrator that he would pay more than seven hundred dollars for said interest, the amount of the said Chemung, or would abide his bid of seven hundred and fifty dollars.

Deny that afterward or at any time complainant was informed by the said administrator that the hearing as to which of said offers would be accepted would be heard in the Probate Court on the 26th day of July, 1897, or that said administrator notified complainant to be present at said hearing.

Deny that the said Chemung Mining Company, at the time of making the said bid, or at any time, was without funds in its treasury. Deny that on the 13th day of August, 1897, or at any other time, the said Chemung Mining Company, did not have any money or sufficient money with which to make its bid for the said property good. Deny that said company had never at any time authorized or directed said purchase of the said "Skookum" interest to be made by any person for it. Deny that the said bid made by or on
65 behalf of the said Chemung Mining Company for the purchase of the said interest in the "Skookum" mining claim was a sham bid. Deny that said bid so made on behalf of the Chemung Mining Company was made without authority or without the means to make it good, or that said bid was a fraudulent device intended to prevent any sale at the time, contrived by these answering defendants for purposes of their own as alleged in the complainant's bill of complaint, or at all.

Deny that the complainant, well knowing or knowing at all that the said bid was not the bid in fact of the Chemung Mining Company, or being willing to increase his own holdings in said "Skookum" mine, in pursuance of the invitation of the said administrator to be present on the 26th day of July, 1897, for that purpose, repaired to Murray, Idaho, or appeared in the Probate Court on said day, or there or then informed the said administrator or the said Probate Court that he was ready and willing to make his said pretended bid good or pay for said interest in said "Skookum" mine, the sum of seven hundred and fifty dollars in cash, or that said complainant made any bid or ever paid any sum on his own behalf for said interest, or that said complainant made any bid or offered for said interest any sum in excess of the bid or offer made on behalf of the Chemung Mining Company, as hereinafter set forth.

Deny that the said administrator or said Probate Court then and there informed the complainant that they expected still other bids from other parties, or that for the purpose of giving time to said expected bidders to arrive, the Judge of the said Probate Court, took a recess of the Court from 12 M. to 4 P. M. of said day, or any other amount of time, or that there were no other bids then the bid

of complainant. Deny that the said Chemung Mining Company put in no appearance or failed to appear at said time by its attorney, A. G. Kearns, or by any other person, representing said com-
66 pany. Deny that said Chemung Mining Company failed to make good its offer by the deposit of the money thereon. Deny that complainant's offer of seven hundred and fifty dollars was the highest bid, or was any bid at all, or was accompanied by any cash. Deny that the said Probate Court then or there ever confirmed any sale to the complainant or directed said administrator to accept seven hundred and fifty dollars from the complainant or any money from the complainant, or executed any conveyance to the complainant, or that any of said acts or things were done by the said administrator, or that the *complainant the* price or any price to the said administrator, or received a deed or any deed from said administrator, or placed the same on record except as hereinafter stated.

Deny that the Exhibit "B" attached to the complainant's bill of complaint is a copy of any proceedings ever had in the Probate Court of Shoshone County, Idaho, or that the said Exhibit "B" accurately recites or recites at all any acts or proceedings ever had or done in said Probate Court, except as hereinafter stated. Deny that the sum of seven hundred dollars recited in said Exhibit "B" is erroneous as to any amount bid or prayed, but alleged that said alleged decree Exhibit "B" correctly recites an invalid and illegal proceeding had in said Probate Court as hereinafter more full- set forth.

Answering complainant's allegations contained in his bill of complaint wherein he alleges that about the 6th day of October, 1897, he was informed by rumor that some proceedings had been had in said Probate Court, by which the title which had been conveyed to him by virtue of the proceedings theretofore had in said Court on the 26th day of July, was brought in question, and that said administrator had been ordered and directed by said Probate Court to make another conveyance of said interest in said mine to the said Chemung Mining Company, and had refused to comply with said direction to make said second conveyance upon the ground
67 that he had under the decree of July 26th, 1897, conveyed all the title held by said estate therein and could convey nothing further, and that the Chemung Mining Company brought its action of mandamus in the District Court of the First Judicial District, in and for the County of Shoshone, State of Idaho, to compel said administrator to execute a conveyance to the said Chemung Mining Company, ordered by said Probate Court, and that then it was that the complainant was advised of the proceedings which had been had in the Probate Court in the meantime, and reciting the proceedings had in said Probate Court, and that the said proceedings were without notice to the complainant in this action and without any knowledge thereof on his part, or that judgment thereon was had upon an *ex parte* showing made by the Chemung Mining Company, these answering defendants allege the truth to be that at all times in said proceedings so instituted in the Probate Court as

aforesaid, for the purpose of setting aside said fraudulent order referred to as Exhibit "B," and in the proceedings for the mandamus in the District Court aforesaid, and all of the proceedings subsequently thereto, the complainant, Kennedy J. Hanley, while not appearing in person or in name, as these defendants are informed and believe, and on such information and belief, allege, maintained at his own expense said proceedings and said litigation and defended against the same, employed his own counsel to appear for him, before the District Court and subsequently before the Supreme Court of the State of Idaho as hereinafter more particularly set forth, and had knowledge of all matters and things complained of and of the proceedings had in connection with the said interest in said claim. That all of the acts and things recited by complainant in his bill of complaint as having been had and done in the said Probate Court toward the cancellation of the said erroneous and fraudulent order, as contained in said Exhibit "B" have been reviewed by the
68 District Court of the First Judicial District of Idaho, in and for Shoshone County, as hereinafter set forth, and were by said District Court confirmed, and the action of the said District Court has been reviewed and affirmed by the Supreme Court of the State of Idaho, as hereinafter set forth, and during all of the proceedings in the said District Court and in the said Supreme Court touching the validity of the action of the said Probate Court, in setting aside the fictitious and fraudulent order, Exhibit "B," complainant Kennedy J. Hanley, while not appearing by name, employed counsel to represent his interests and conducted such proceedings on his own behalf, and the said District Court and the Supreme Court were fully advised of all the facts and the law in the premises, and rendered their judgment thereon affirming the action of the Probate Court complained of by the complainant in this action, upon which he bases his pretended claim to the one-third interest in the said "Skookum" mining claim.

Deny that either in the Probate Court proceedings recited in the complainant's bill of complaint, after the 26th day of July, 1897, or in the proceedings in the District Court, were complainant's claim or rights never investigated or presented, but allege the facts to be that in both said courts, and in all proceedings had therein, complainant's claim and rights were fully presented and investigated, and the judgment of the said courts rendered thereon. Deny that complainant was not a party to said proceedings, or that said proceedings were begun secretly in order to exclude the complainant from any part therein, or that they were prosecuted to that end, or any end, without notice to complainant, or without any attempt to make him a party in any way, but allege the fact to be that complainant appeared at all stages of said proceedings, while not in name, by counsel, who fully presented and defended whatever rights complainant had in the premises in said proceedings.

69 Deny that the defendants or any of them procured any legal or fraudulent proceedings to be taken against the complainant, but allege the fact to be that all proceedings had in connection with said interest in said "Skookum" mine in either the Pro-

bate Court aforesaid or the District Court aforesaid, or the Supreme Court aforesaid, have been in conformity with the law and that the real and true facts in connection with complainant's rights and the rights of all parties in thr premises have at all times appeared in all of said proceedings.

Deny that the proceedings of the said Probate Court of date of August 13, 1897, were without the jurisdiction of their subject matter, or the parties in interest, but allege the fact to be that said probate Court had jurisdiction of both the subject matter and the parties in interest.

Deny that after the close of the July term said probate Court, it had no power or authority to set aside in August, 1897, or at any time, the pretended judgment or decree made by it at its former term, as it did on August 13th, 1897. Deny that the complainant was entitled to any notice of the proceedings of August 13th, 1897. Deny that the proceedings of the said probate Court, or any of them, whereby the Chemung Mining Company, was adjudged to be entitled to a deed for the said interest in the said "Skookum" mining claim, as herein set forth were null and void. Deny that the said decree of August 13th, 1897, was null or that the proceedings thereunder were totally void, or void at all.

Deny that the defendants Clark and Sweeny, or either of them, in any transactions with the complainant at any time treated him with bad faith or unfairly.

Deny that pursuant to any negotiations on the 30th day of April, 1898, or at any other time, any contract was entered into by which complainant agreed to execute a conveyance for his two pretended interests claimed by him in the "Skookum" claim; to-wit: one for one-eighth and another conveyance for one-third interest, and
70 placed the same in escrow in said Exchange National Bank of Spokane, or elsewhere, at the price of ten thousand dollars, or any price for the whole, or that it was further distinctly understood or agreed, or understood or agreed at all, that neither deed should be delivered without the payment of the fixed price of ten thousand dollars, or that upon said payment of said sum by Sweeny and Clark within the time specified or at any time any envelope containing the two deeds should be delivered to the said Sweeny and Clark by the custodian thereof, E. J. Dyer, the cashier of said bank, and if not paid the same to be returned to the complainant. Deny that the complainant ever executed or placed in escrow two deeds in one envelope, one for a one-eighth interest and for a one-third interest in the "Skookum" claim, the same to be delivered to the defendants Clark and Sweeny, and upon any terms whatever, but allege the facts in connection with said matter to be as hereinafter stated.

Deny that at the same or any time, complainant and defendants Clark and Sweeny placed a second envelope containing a certificate representing one hundred thousand shares of the stock of the said Chemung Mining Company in escrow at the agreed price of twenty thousand dollars, or that the defendants paid before the deposit of said escrow for the said one hundred thousand shares of stock the sum of two thousand dollars, or that there remained to be paid

thereon the sum of eighteen thousand dollars, as shown by any endorsement contained upon the outside of any envelope, on August 1st, 1898. Deny that the price of said stock agreed upon by the parties was twenty cents per share, or twenty thousand dollars for the stock. Deny that ten thousand dollars was the price agreed upon for the interest in the "Skookum" Claim, or that said sums were severally endorsed upon the outside of the said envelopes, as the price to be paid by the defendants Clerk and Sweeny to entitle them to be taken up as in said complaint alleged. Deny that upon the
71 envelope con*con*taining the stock the endorsement required eighteen thousand dollars to be paid, or that the said Sweeny and Clark before depositing said envelope had paid two thousand dollars on account of said stock, but allege the truth to be that on said 30th day of April, 1898, said Clark and Sweeny did enter into a contract with the complainant whereby they agreed to purchase from the complainant one hundred thousand shares of the Chemung Mining Company's stock, and an undivided one-eighth interest in said "Skookum" claim for the price or sum of twenty thousand dollars. That the said sum of twenty thousand dollars was to be in full payment for the said stock and the said one-eighth interest, and thereupon there was placed in an envelope certificates for said one hundred thousand shares of the capital stock of the said Chemung Mining Company and also in the same envelope with said certificate there was placed a deed from complainant, Kennedy J. Hanley, to said company for an undivided one-eighth interest in said Skookum claim. That upon placing the said stock and said deed for the one-eighth interest in the said envelope and placing the same in escrow in the Exchange National Bank, said Clark and Sweeny paid the Complainant the sum of two thousand dollars on account of the said sum of twenty thousand dollars. That the terms upon which the said stock and the said deed were to be delivered to the said Clerk and Sweeny were endorsed upon the envelope containing said certificate of stock and said deed. That the terms upon the said envelope were fully complied with by said Clark and Sweeny and the whole sum of twenty thousand dollars was paid to the custodian of said escrow within the time specified and agreed upon, which said sum of twenty thousand dollars was received by the said Hanley, and appropriated to his own use, and that upon the payment of the said sum of twenty thousand dollars so as aforesaid the defendants Clark and Sweeny took up the said certificate for one hundred thousand shares of the stock of the Chemung Mining Company, and at the same time said deed which was contained in the same envel-
72 ope with said stock, said deed being for an undivided one-eighth interest in the said "Skookum" mine and the defendants Clark and Sweeny placed the said deed of record as they of right should do, and transferred said stock to their own use and purpose.

That upon the payment of the said twenty thousand dollars so as aforesaid by defendants Sweeny and Clark, they acquired and became the owners of the said one hundred thousand shares of stock in the Chemung Mining Company, and of the said one-eighth interest in said "Skookum" mining claim.

Defendants Sweeny and Clark further allege the fact to be that about the 30th day of April, 1898, the said Hanley made a fraudulent and fictitious claim to the ownership of an undivided one-third interest in said "Skookum" mining claim, in addition to the one-eighth interest aforesaid, and that the question as to whether or not the said Hanley was the owner of the said undivided one-third interest in said "Skookum" claim was then pending and undecided in the Supreme Court of the State of Idaho. That these answering defendants requested said Hanley to place a conditional price upon said contested one-third interest in said "Skookum" claim, said price to govern in the event that final judgment in said proceedings should be in favor of Hanley. The title of the said suit so pending as aforesaid, which involved the title to the said one-third interest in the "Skookum" claim was "The people of the State of Idaho, *ex rel.*, The Chemung Mining Company, plaintiff and respondent, *vs.* Clarence Cunningham, Administrator of the Estate of David McKelvey, deceased, defendant and appellant." That the said Clarence Cunningham had assumed to make a deed to Hanley for the one-third interest claimed by him, and the Chemung Mining Company had commenced said action to set aside said deed and compel said Cunningham to make a deed to said Chemung Mining Company for said one-third interest. That the District Court of the First Judicial
District of the State of Idaho, in and for Shoshone County,
73 had entered a decree in favor of the Chemung Mining Company and against Clarance Cunningham, administrator, and ordered said Cunningham, as administrator of said estate, to make a deed to the said Chemung Mining Claim for the one-third interest claimed by Hanley in said "Skookum" mining claim from which said decree said Cunningham has appealed, and said Hanley was the real party in interest represented by said Cunningham, and defendants are informed and verily believe that said Hanley paid the expenses of said appeal, employed counsel to represent said appeal, and was at all times present when said cause was being argued, both in said District Court and in the Supreme Court of Idaho, and maintained and conducted said litigation. That the said case was pending in the Supreme Court of Idaho on appeal from the said decree of the District Court from about the 8th day of December, 1897, until the 3rd day of May, 1898, on which said last mentioned date the said Supreme Court of Idaho affirmed the judgment of the said District Court, which decision is reported in the 53rd Pacific Reporter, at Page 451 thereof, and decided that no title passed to said Hanley by virtue of the deed made to him by Cunningham so as aforesaid, and thereupon the said Cunningham made application to said Supreme Court of Idaho for a re-hearing of said cause, and on the 13th day of June, 1898, a re-hearing was denied and the judgment aforesaid of the District Court was finally affirmed, and the said Cunningham was ordered to deliver a deed to the said Chemung Mining Company for the said one-third interest so claimed by Hanley as aforesaid. That it was while said cause was so pending on appeal as aforesaid, in the Supreme Court of Idaho, that the defendants Clark and Sweeny, acting for the Chemung Mining Company, entered into

said agreement with Hanley, by which he placed in escrow said deed for the one-third interest in the "Skookum" mining claim to be delivered upon payment of ten thousand dollars as aforesaid. That upon the final decision of the said cause in the Supreme
74 Court of Idaho, wherein it was decided that the said Hanley had no title to the said one-third interest, the defendants Clark and Sweeny or the Chemung Mining Company no longer desired to purchase said pretended interest of the said Hanley, so involved in said litigation as aforesaid, and after said final decision they nor either of them ever contemplated the taking up of said escrow and the payment of the said ten thousand dollars.

Deny that ever at any time the complainant or defendants Clark and Sweeny, or either of them placed in a second envelope, or in any envelope by itself, a certificate representing one hundred thousand shares of the stock of the Chemung Mining Company, held by the complainant in said company, and placed the same in escrow at the agreed price of twenty thousand dollars, or at any price at all, or that they ever made any payment on said escrow, but allege the facts to be that there was placed in said envelope along with said one hundred thousand shares of stock in the said Chemung Mining Company a deed from said complainant Hanley to the Chemung Mining Company for an undivided one-third interest in the said "Skookum" lode claim, which said one hundred thousand shares of stock in the Chemung Mining Company, and the said deed for the one-eighth interest in the "Skookum" mining claim, whereby by the terms of the said escrow agreement, as indorsed, upon the envelope containing said stock, and said, deed for a one-eighth interest in the said "Skookum" claim, to be delivered upon the payment of the sum of twenty thousand dollars.

Deny that the price of said stock as agreed upon by the said parties was twenty cents per share or twenty thousand dollars for the said one hundred thousand shares of said stock, or that any price per share was ever agreed upon between said parties for said stock, independent of or disconnected with the price to be paid for said stock and said deed for one-eighth interest as aforesaid. Deny that the price agreed upon for the said interest in the "Skookum"
75 claim was ten thousand dollars, or that said price or said sums were severally indorsed or indorsed at all on the outside of said envelopes as the price to be paid by the defendants Sweeny and Clark to entitle them to be taken up.

Admits that the execution of the two deeds, instead of making a single instrument to convey all of the interest which the said Hanley pretended to have in the said "Skookum" claim was at the instance of the defendants, and alleges the facts to be that the defendants Clark and Sweeny demanded that separate deeds should be made for the one-eighth interest which it was admitted said Hanley owned, and a separate deed for the one-third interest which it was never conceded that the said Hanley owned, and which he was adjudged not to have been the owner of.

Deny that the envelope, or any envelope, the one thereof containing two deeds for said "Skookum" mining interests and the other thereof

the certificate of stock in the Chemung Mining Company, were taken to the said bank, or were delivered to the said E. J. Dyer, cashier of said bank, but allege the fact to be that neither of the said envelopes contained two deeds but that one thereof contained the certificate for one hundred thousand shares of the stock of the Chemung Mining Company, together with the deed for the undivided one-eighth interest in said "Skookum" claim, and that the other of said envelopes contained the deed for the undivided one-third interest in the "Skookum" claim, which said Hanley pretended to own, and which ownership these defendants never admitted. That the envelopes as delivered to the said E. J. Dyer, cashier of said bank, in escrow, contained, the one thereof said stock and said deed for the one-eighth interest and the other thereof said deed for the said one-third interest.

Admits that at the request of defendants Clerk and Sweeny, on the 7th day of June, 1898, complainant extended the time for the payment on the envelope containing the deed for the one-eighth interest in the "Skookum" claim, and the one hundred thousand shares of stock in the Chemung Mining Company, as aforesaid, until
76 the 20th day of September, 1898, and that the said extension was upon the stock of the said Chemung Mining Company and the deed for the one-eighth interest and not otherwise.

Admit that on the 7th day of June, 1898, complainant extended the time for the payment to be made upon said deed for the one-third interest, so wrongfully claimed by complainant as aforesaid, and not otherwise. Admit that the defendants Clark and Sweeny paid said complainant two thousand dollars on the said seventh day of June, 1898, on account of said escrow, but alleges the fact to be that the said two thousand dollars was paid wholly and solely on account of the escrow containing said one hundred thousand shares of stock and said deed for the one-eighth interest in the "Skookum" claim, and that no part thereof was paid upon any contract for the purchase of, or on any escrow containing said deed for said one-third interest in the "Skookum" claim.

Deny that on the 21st day of September, 1898, or at any other time, complainant, upon calling at the said bank, found that said Sweeny, acting for himself and the said Clark, or at all, had opened the envelope containing the deed for the said one-third interest, or had in any manner disturbed same, but admit that prior to September 21st, 1898, the said Sweeny did call at the said bank and did pay the balance of sixteen thousand dollars due upon said escrow contract for the delivery of the said stock and the said deed for the one-eighth interest in the "Skookum" claim which were contained in the same envelope, and did then and there, upon making the said payment, take into his possession said one hundred thousand shares of stock and said deed for the one-eighth interest in the "Skookum" claim, as he had a right to do. That said stock and said deed for the one-eighth interest were upon said date when said payment was made and at all times had been contained in the same en-
77 velope, pursuant to the contract, understanding and intention of all the parties thereto.

Deny that the defendants Sweeny and Clark, or any other person

within their knowledge, acting for them or on their behalf, ever opened, examined or sought to open or examine the envelope containing said deed for the one-third interest in said "Skookum" claim so deposited in escrow as aforesaid, but allege the fact to be that these defendants had no interest in the said envelope or said deed, after the decision of the Supreme Court of Idaho holding that complainant had no title upon which to base said deed.

These defendants deny, upon information and belief, that the custodian of the said escrow contracts ever informed complainant that he could not give him any information as to what had become of said deed for the one-eighth interest in the "Skookum" claim, but allege the fact to be that the sealed envelope containing the said one-third interest in the "Skookum" claim had never been unsealed or opened prior to the time when the complainant called upon the custodian thereof as aforesaid, and requested to see the same, and, on information and belief, allege the fact to be that said custodian, in the presence of the said Hanley, opened said envelope containing said deed for the one-third interest in the said "Skookum" claim, and that the same had never been opened prior to that time, and that said envelope contained no other paper, document or thing than the deed for the said one-third interest in the "Skookum" claim.

Deny that sometime between the thirtieth day of April, 1898, and the said twenty-first day of September, 1888, or at any other time, any deed or deeds was or were ever extracted unlawfully or surreptitiously from said envelopes or at all extracted from said envelope without the consent or knowledge of the complainant, or without the payment of all of the sums of money that under said contract were to be paid thereon, or without doing all of the things on
78 the part of these defendants which they were required to do by virtue of the contract aforesaid, but allege the fact to be that the said deed for the one-eighth interest in the "Skookum" and the said one hundred thousand shares of stock were rightfully and lawfully taken from the possession and custody of the said Dyer, in strict conformity and compliance with the provisions of the contract under which the same were deposited with him, and not otherwise.

Deny that during all of the negotiations for the sale of complainant's interest in said "Skookum" claim, or during any time, or at any time, it was ever understood that the price fixed upon the same was without any reference to the extent of the complainant's interest, or that the complainant refused to negotiate or contract for the sale of the one-eighth interest only, at any price, unless the whole should be included. Deny that when the bargain resulting in the escrow of complainant's said interests in said "Skookum" claim was agreed to, that it was with the explicit understanding and agreement, or with any understanding or agreement, that the complainant's interest in the "Skookum" claim represented by the two conveyances executed by the complainant to the defendants Clark and Sweeny were to go as one single sale, or that it was separate and distinct from the stock escrow, or that the two deeds were to be placed in a separate envelope for that reason, or that com-

plainant during all of the negotiations, or at any time, or at the time the contract was finally agreed to, or at any time, refused to make any contract for the sale of any interest he claimed in the said "Skookum" claim, unless or except it should be for the whole of what he claimed, or that it should be separate and distinct from the contract for the sale of the Chemung stock, or that the taking of this deed from the possession of the said custodian thereof for the one-eighth interest was a gross or wilful fraud, or any fraud, or perpetrated without the knowledge of the complainant or perpetrated at all, or was in defiance or in violation of the contract be-
79 tween said parties. Deny that through fraudulent means the said Clark and Sweeny have obtained an apparent title to the said one-eighth interest in said "Skookum" mine, in violation of their agreement to pay ten thousand dollars therefor, or without any consideration whatever, but allege the fact to be that the said defendants obtained an actual, real and *bona fide* title to the said one-eighth interest in the said "Skookum" claim, in strict compliance with their agreement, and paid therefor the full amount contracted to be paid therefor, and that no act or thing done by the said Clark and Sweeny was against right, justice or good conscience.

Defendants Sweeny and Clark deny that they or either of them procured the agreement with complainant to sell his interest in the "Skookum" mine by covin or fraud, as alleged in complainant's bill of complaint, or in any manner. Deny that the said "Skookum" mine had been reached for working purposes by certain workings known as the Last Chance workings, in the exclusive control of the said Sweeny and Clark, or that they or either of them declared at the time of the agreement, by which they took the option for the purchase of the interest of complainant, that the works of the Last Chance mine had penetrated to the said "Skookum" claim, and that they knew that the ground was of little value, or that it contained no ore, or that being in the exclusive control of said workings said ground could not be reached in any other way, or that they stated that they desired to purchase it, not because of its value for ore, but because it was surrounded by other claims which were of value or would be useful to them for combining it for working purposes with the said other ground, or give breadth, bulk or character to the plan to put the concolidated land on the market, but allege the fact to be that complainant at all times had full knowledge as to the ex-
tent and character of the workings leading to or within said
80 "Skookum" claim, and of the extent, character and value of the ledge and ores therein, and at all times had free access thereto and to every part thereof. Deny that the complainant had no means of personal knowledge as to the value of said ground, except as to its situation with reference to other claims of which he had some knowledge, but allege the facts to be that the complainant had full means of personal knowledge and full knowledge as to the value of said ground at all times. Deny that the complainant relied upon the representations of the defendants Clark and Sweeny, or either of them, that they had not in their works penetrating said claim found any ore or ore bodies, or that they had no more informa-

tion about the same than the complainant. Deny that the complainant fixed the price of his entire interest in the "Skookum" claim at ten thousand dollars.

Deny that the said works penetrating said "Skookum" claim had disclosed immense body of ore of great value, or any body of ore of great value at the time of the making of the contract aforesaid, or at the time of the placing of the said deed in escrow. Deny that the said Sweeny and Clark, or either of them, wilfully falsified or misstated, or falsified or misstated at all, the facts to the complainant, or any facts to the complainant that they might procure said contract with him, or defraud him into making any agreement to sell his said interest, well knowing or knowing at all that he was ignorant of the truth, or that they wilfully misstated or misstated at all the facts as aforesaid, or any facts which were well known to them at the time, or known to them at all.

Deny that the ores contained in the "Skookum" mine are of such value that there has been taken out of said ore body then disclosed in said ground up to the present time, or up to the time of the commencement of this suit, ore of the value of not less than one hundred and fifty thousand dollars, over and above the cost of mining, treating, extracting and marketing the same, or
81 in which the complainant is entitled to any share or interest therein, but allege the fact to be that there has not been taken from any ore body that was disclosed in said ground at the time of the placing of said deeds in escrow and the making of the contract therefor any ore of any value, and that no ore bodies of known value had been disclosed in said ground at the time of the making of said contract and the placing of said deeds in escrow.

Deny that the defendants Sweeny and Clark, combining with any other persons to the complainant unknown, have organized under the laws of the State of New York, the corporation defendant in this action, but allege the truth to be that said corporation was organized under the laws of the State of New York in strict conformity therewith, without any combination with the said Clark and Sweeny, but in the ordinary and usual course of business. Admit that since the — day of ——, 1898, the said corporation defendant has been engaged in working, and mining the ores contained in the said "Skookum" mining claim; admit that the said Clark and Sweeny, since the organization of said corporation have been officers thereof and stockholders therein. Deny that the said corporation defendant had or has any knowledge of any frauds practiced by said Clark and Sweeny, or either of them, upon complainant. Deny that the said Clark and Sweeny or either of them, have ever practiced any frauds upon the complainant, as alleged in the said bill of complaint, or otherwise, or that the defendants Sweeny and Clark are receiving the fruits of any fraud practiced by any person. The defendants Clark and Sweeny admit that they give out and assert since the record of said deed for the one-eighth interest in said "Skookum" claim, as aforesaid, that they and their grantee, the Empire State-Idaho Mining and Developing Company, the defendant herein, own said "Skookum" claim. Admit that they so give out and assert

that the complainant has no interest therein, and allege that said assertion is true. As officers and agents of the said corporation defendant the defendants Clark and Sweeny admit that they intend, on behalf of said corporation, to extract the ores from the said "Skookum" mine and appropriate the same to the use of the said corporation, the owner of said claim. Defendants deny that they are rapidly exhausting the ores contained in the said mine to the utter destruction of the complainant's rights or to the destruction of any rights of the complainant. Deny that the complainant has no plain, speedy or adequate remedy at law therefor. Deny that the complainant was been wronged or injured or suffered an damages by reason of any act or thing done or omitted by the defendants, or either of them, on account of which he could maintain any action either at law or in equity in any court. Admit that the defendant corporation claims an interest in the said "Skookum" claim, adverse to the complainant, but denies that said claim is without right, and allege the fact to be that the complainant has no interest or estate in said undivided interest in said "Skookum" claim, or any interest in said "Skookum" claim, or at all.

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These defendants allege the truth to be that by virtue of good and sufficient mesne conveyances the defendant the Empire State-Idaho Mining and Developing Company, is now the owner of the said "Skookum" mining claim, and every part thereof.

And these defendants deny all and all manner of unlawful combination and confederacy herewith they or either of them are by said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, strictly within the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

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HEYBURN, PRICE, HEYBURN & DOHERTY,
Solicitors for Defendants.

W. B. HEYBURN,
Of Counsel.

Charles Sweeny makes solemn oath and says: I am one of the above-named defendants. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

CHARLES SWEENY.

Subscribed and sworn to before me this 29th day of April, 1899.

W. B. SAMS,
Notary Public.

Service of copy of this answer received this 29th day of April, 1899.

JNO. R. McBRIDE,
Of Counsel for Complainant.

(Endorsed:) Filed May 1st, 1899. A. L. Richardson, Clerk. By M. Cozier, Deputy.

84 *Replication.*

In the Circuit Court of the United States, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK and THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, Defendants.

Replication of Kennedy J. Hanley, Complainant, to the Answer Filed by Defendants.

This replicant, saving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said Answer of the said defendants, for exception thereto saith: That he will aver and prove his bill to be true, certain, and sufficient in the law to be answered unto, and that said answer is uncertain, untrue, and insufficient to be replied unto by this replicant. Without this, that any other matter or thing whatever in the said Answer contained material or effectual in law to be replied unto, compassed and avoided, traversed or denied, is true. All which matters and things this replicant is and will be ready to aver and prove as this Honorable court shall direct and humbly prays as in and by said bill he hath already prayed.

JNO. R. McBRIDE,
Solicitor for Complainant.

Service of the within replication by copy thereof accepted this 29th day of May, 1899.

HEYBURN, PRICE, HEYBURN & DOHERTY,
Solicitors for Defendants.
JNO. R. McBRIDE,
Complainant's Solicitor.

(Endorsed:) Filed May 29th, 1899, A. L. Richardson, Clerk, By M. Cozier, Deputy.

85 EXHIBIT "B."

In the United States Circuit Court, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK and EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, Defendants.

Modified Decree.

In pursuance of the mandate of the United States Circuit Court of Appeals, for the Ninth Circuit, filed herein on the 19th day of March, 1904, and the decree and opinion of that Court referred to in said mandate, which said mandate directs this Court to modify the final judgment and decree entered herein November 17th, 1902, this cause came on for further proceedings upon motion of counsel for complainant; and the Court of Appeals having determined that Hanley was fraudulently excluded from the mine until at least May 6, 1901, and said Court having directed this Court to fix the date when defendants ceased to exclude Hanley and gave or offered to give him or his representatives free access thereto, and to modify the judgment and this Court having determined that the defendants to the said suit did not cease to exclude Hanley from the mine and did not give, or offer to give him or his representatives free access thereto, and inspection thereof, until January 1, 1902, it is now ordered, adjudged and decreed that the decree heretofore entered in this cause on the 17th day of November, 1902, be and the
86 same is hereby so modified that the same shall read as fallows:

I.

That the conveyance made by Kennedy J. Hanley to Charles Sweeny and F. Lewis Clark on April 30th, 1898, of a one-eighth interest in the Skookum patented mine and mining claim, and the ore therein contained, which said mine is situated in Yreka Mining District, Shoshone County, Idaho, is hereby canceled, set aside and declared to be null and void from its date.

II.

That the defendants, Charles Sweeny, F. Lewis Clark, and the Empire State-Idaho Mining and Developing Company have, and each of them has, no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim and the ores therein contained. That the complainant, Kennedy J. Hanley, since April 30th, 1898, has been and now is the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him.

III.

That complainant, Kennedy J. Hanley, have and recover from defendant Empire State-Idaho Mining and Developing Company the sum of two hundred sixty thousand six hundred seventy-two and forty-three hundredths dollars ($260,672.43), with interest on Two hundred fifty-five thousand fifty-one and forty hundredths dollars ($255,051.40), from February 15th, 1902, until paid, at seven per cent. per annum, and costs amounting to three hundred sixty-
87 one and twenty hundredths dollars ($361.20) the said sum comprising the following items:

1. Two hundred forty-nine thousand, two hundred eighty-seven and forty-six hundredths dollars ($249,287.46), being one-eighth of the gross proceeds less freight treatment and rebate of said ores taken from said Skookum mine and mining claim by defendants between May 15th, 1898, and March 18th, 1899, and between March 18th, 1899, and January 1, 1902.

2. Five thousand seven hundred and sixty-three and ninety-seven hundredths collars ($5,763.97), being one-eighth of net proceeds from ores taken from said Skookum mine by defendants from January 1, 1902, to February 15, 1902.

3. Five thousand six hundred twenty-one dollars ($5,621.), being one-eighth of the net proceeds after deducting freight and treatment, mining, milling, hoisting and working expenses, including charges for use of improvements, of all said ores taken from the said Skookum mine between February 15, 1902, and May 18th, 1902.

And it appearing further from the records in this cause that immediately after November 17th, 1902, upon presentation of a copy of the decree of November 17, 1902, the First National Bank of Wallace, Idaho, did pay to Kennedy J. Hanley, $5,523.42; it is therefore ordered that the said amount shall be and is a credit upon the aforesaid decree from November 17, 1902, reducing the amount mentioned in paragraph three by said sum of $5,523.42.

And whereas, the complainant herein by separate appeal to the said Circuit Court of Appeals from the said decree did secure a modification of said decree in his favor with costs of his appeal taxed at $926.00, which said modification has been made, and it is
88 decreed therefore that said Hanley shall recover from defendant company in addition to the sums hereinabove specified, the further sum of $926.6- as costs on his said appeal.

And whereas, an appeal was taken by the Empire State-Idaho Mining and Developing Company from the said decree entered November 17, 1902, to the United States Circuit Court of Appeals for the Ninth Circuit, whereby it was sought to reverse said decree, and for the purpose of securing a stay of proceedings and supreseding the said judgment so entered on November 17, 1902, (for the sum of $175,867.02), the Empire State-Idaho Mining and Developing Company as principal and the American Bonding Company of Baltimore as surety, did on the 24th day of November, 1902, make and execute a supresedeas bond (which said bond was approved by a Judge of this Court), and was thereafter filed in this Court,

and said bond bound the said principal and surety to Kennedy J. Hanley in the sum of two hundred thousand dollars ($200,000) and was conditioned that if said Empire State-Idaho Mining and Developing Company should prosecute its said appeal from said judgment and decree of November 17, 1902, to effect and answer all damages and costs if it fails to make its said appeal good the obligation should be void; otherwise to remain in full force and effect; and

Whereas, at the time of the execution of said bond there was due to complainant under the decree aforesaid as it then stood a balance of one hundred seventy thousand three hundred forty-three and sixty hundredths dollars ($170,343.60) (the sum of $5,523.42 having been paid by the bank), together with costs accruing in said Circuit Court amounting to three hundred sixty-one and twenty hundredths dollars ($361.20), and with interest upon the said balance at seven per cent. (7%) from November 17th, 1902; and

Whereas, the Empire State-Idaho Mining and Developing
89 Company failed to prosecute its said appeal to effect and failed to make its said appeal good, and failed to answer any of the damages or any costs, and the said liability upon the bond thereby became fixed; and

Whereas, obligee, the complainant herein, was allowed costs on said appeal in the sum of $26.10;

And it appearing further that no part of said obligation has been paid and the said judgment and decree and every part thereof (excepting the money paid by the bank as heretofore specified) remains entirely unsatisfied;

Now therefore, it is hereby ordered, adjudged and decreed that Kennedy J. Hanley have and recover from the Empire State-Idaho Mining and Developing Company and from the American Bonding Company of Baltimore, or either of them, the sum of $170,343.60, with interest from November 17th, 1902, until paid at the rate of 7% per annum, and with costs amounting to $387.30, and complainant herein is entitled to execution it being further provided that the payment of the said sum of $170,343.60, with interest from November 17th, 1902, and costs by either the said Empire State-Idaho Mining and Developing Company or the American Bonding Company of Baltimore, shall discharge the said American Bonding Company of Baltimore of all liability to complainant under the said bond and shall to the extent of the amount paid apply on as part payment of the decree and judgment first above set forth.

It is further ordered, adjudged and decreed that complainant have his execution for the said amounts and for costs.

Dated this 10th day of May, 1904.

JAMES H. BEATTY, *Judge.*

[SEAL]

Attest: A. L. RICHARDSON, *Clerk.*

(Endorsed:) Filed May 10th, 1904. A. L. Richardson, Clerk.

90 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.* Amended answer. Filed Oct. 27th, 1905. A. L. Richardson, Clerk.

91 *Stipulation.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Stipulation.

It is hereby stipulated between the complainant and the defendants in the above entitled cause, that the complainant's exceptions to the defendants' amended answer may be set down for hearing at Moscow, Idaho, Friday, on the 26th day of October, 1905, at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard.

Dated this 26th day of October, 1905.

M. A. FOLSOM,
Solicitor for Complainant.
GEORGE TURNER,
Solicitor for Defendants.

92 Endorsed: No. 326. In the United States Circuit Court for the District of Idaho, Northern Division. Kennedy J. Hanley, Plaintiff, *vs.* Empire State-Idaho Co., Federal Mining & Smelting Co., Defendants. Stipulation. Filed Oct. 27th, 1905. A. L. Richardson, Clerk. M. A. Folsom, Attorney for Complainant, Empire State Bldg., Spokane, Wash.

93 *Exceptions to Defendants' Amended Answer.*

In the United States Circuit Court for the District of Idaho, Northern Division.

No. 326. In Equity.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Exceptions to Defendants' Amended Answer.

Comes the complainant, Kennedy J. Hanley, and excepts to the amended answer of the defendants upon the following grounds:

Exception One. The amended answer in insufficient in that it sets forth no defense to the matters complained of in the bill.

Exception Two. Said amended answer in insufficient in the following particulars: The complainant alleges in his bill that he is the owner of an undivided one-eighth interest in the Skookum mine and mining claim and the ores therein contained, described in the bill, and that he has owned said interest since prior to April 30th, 1898, and that on or about November 17th, 1902, a decree was entered in his favor by the United States Circuit Court for the District of Idaho, a court having jurisdiction of the subject matter and the parties, against the defendant Empire State-Idaho Mining and Developing Company through whom the other defendant herein, Federal Mining and Smelting Company derives its title, which decree quieted the title of said Hanley to said one-eighth interest in said claim and ore bodies against said defendant, and which
94 decree adjudged that he was entitled to one-eighth of the ores underneath the said Skookum claim. And by the bill herein it is further shown that since the entry of such decree defendants herein have extracted large amounts of ore of great value from the ore bodies within said Skookum mine and claim, and have had exclusive control of the said Skookum mine and ore bodies, and have not permitted complainant to participate in said work or share in the profits thereof, and that the said defendants have mixed the ores with other ores, making it difficult to ascertain the amount, and have failed to pay the said complainant his share of said proceeds. That defendants in their said amended answer have failed to sufficiently answer such allegations in this, that while they admit that said decree was entered quieting said complainant's title as alleged in the bill, and admit that they have mined the ores and have not paid complainant any portion of the proceeds, they pretend that said decree quieting the title to said mine or ore bodies was beyond the power and jurisdiction of the court to make upon the issues presented by the pleadings in that case, but they fail to show by their said amended answer any sufficient reason for their said contention that the said decree exceeded the power or jurisdiction of the court in that case or was without the issues made by the pleadings. That on the contrary their said amended answer and the pleadings in the former case attached thereto and made a part of said answer, show that the said decree quieting title was within the issues there made, and was within the jurisdiction and power of the court to make in said cause; and the said objections alleged in said amended answer to the said decree constitute merely an argument that the court in said former cause committed an error, but they fail to show a lack of jurisdiction on the part of the said court over the said cause wherein said decree was entered.

95 Exception Three. Said amended answer is insufficient in this: It admits that a decree was entered in favor of said Hanley, complainant herein, quieting his said title to said one-eighth interest in and to the said ores and ore bodies as against the defendant herein. Notwithstanding that fact the answer states that defendants are now the owners of the said ore bodies underneath the

Skookum mine by reason of a title thereto which they claim to have by virtue of owning the San Carlos claim containing the apex of the vein wherein said ore bodies are found; but said contention is shown by said amended answer to be groundless because said amended answer admits that defendants owned the San Carlos claim at the time of the commencement of the former suit, and the complaint in said former suit called upon the defendants in said suit to set up every claim of title which they then had to the Skookum mine, Skookum claim, and the ores therein contained, adversely to complainant, and said complaint described the said mining claim and ores definitely, and prayed for determination of all adverse claims of defendants, and for other relief, which it was within the jurisdiction of the court wherein said suit was commenced to award. It therefore appears that said amended answer herein contains an affirmative showing that the defence sought to be interposed to the bill herein has been previously determined adversely to these defendants by a court having jurisdiction of the parties and the subject matter, and the said question has heretofore been full litigated and determined, and is *res judicata.*

Exception Four.—The following portion of Paragraph 2 of said amended answer is impertinent and insufficient because the matter therein stated is shown by the bill and answer to be *res judicata* and therefore ought to be expunged:

96 "And defendants allege the fact to be that the complainant is not now and never was the owner of the ore bodies referred to in the bill of this action, but that at all of said times the said ore bodies were owned exclusively by defendant, Empire State-Idaho Mining and Developing Company, until the date of conveyance aforesaid to this defendant, Federal Mining and Smelting Company, since which time they have been the exclusive property of said defendants."

Exception Five. Paragraph 3 of said amended answer is impertinent and insufficient because the matter therein stated is shown by the bill and said answer to be *res judicata* and therefore the whole thereof ought to be expunged.

Exception Six. Paragraph 4 of said amended answer, and each and every part thereof is impertinent and insufficient because the matter therein stated is *res judicata* and therefore ought to be expunged.

In all of which particulars the complainant humbly insists that said answer is irrelevant, impertinent, insufficient and scandalous; wherefore said complainant excepts thereto and prays that the impertinence and scandal of the said answer excepted to as aforesaid may be expunged and the answer held to be insufficient and that defendants be required to plead further or to submit to a decree against them.

M. A. FOLSOM,
Solicitor and Counsel for Complainant.

Service admitted,

——— ———,
Solicitors for Defendants.

97 Endorsed: No. 326. In the United States Circuit Court for the District of Idaho, Northern Division. Kennedy J. Hanley, Plaintiff, *vs.* Empire State-Idaho Co., Federal Mining & S. Co., Defendants. Exceptions to Defendants' Amended Answer. Filed Oct. 27th, 1905. A. L. Richardson, Clerk. M. A. Folsom, Attorney for Complainant, Empire State Bldg., Spokane, Wash.

98 *Order Sustaining Exceptions to Amended Answer.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Order Sustaining Exceptions to Amended Answer.

This cause came on for hearing on exceptions of complainant to the amended answer of defendants, and the matter having been submitted on stipulation, it is ordered that each of said exceptions is sustained and said answer is held to be insufficient, and the said defendants are hereby required to file forthwith their sufficient answer to the complaint herein, or if they fail to plead further, complainant will be awarded such relief as it appears that he is entitled to.

Dated in open court this 27th of October, 1905.

JAS. H. BEATTY, *Judge.*

99 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho, M. & D. Co., *et al.,* Order Sustaining Exceptions to Amended Answer. Filed Oct. 27th, 1905. A. L. Richardson, Clerk.

100 *Refusal of Defendants to Plead.*

In the Circuit Court of the United States, District of Idaho, Northern Division.

No. 326. In Equity.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

The court having sustained the exceptions of complainant to the amended answer of defendants, herein, and having held that the said amended answer fails to state a sufficient defence to the bill of complaint; and because the defendants believe that the Court is in error in holding that the said amended answer is insufficient and constitutes no defence, the said defendants do now, and each of them does, refuse to plead further to the said bill of complaint.

Dated this 27th day of October, 1905.

F. T. POST,
GEORGE TURNER,
Solicitors and Counsel for Defendants.

101 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.*, Refusal of Defendants to Plead. Filed Oct. 27th, 1905. A. L. Richardson, Clerk.

102 *Motion of Complainant for Decree.*

In the United States Circuit Court for the District of Idaho, Northern Division.

No. 326.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Motion of Complainant for Decree.

Comes complainant, after the court has sustained the exceptions to defendants' amended answer herein, and ordered them to file a sufficient answer to the bill under penalties therein prescribed, and after the defendants have filed a notice that they decline to plead further, but elect to stand upon their amended answer already filed

without changing the same, and complainant moves the court to enter a decree in his favor for one-eighth of the respective amounts stated in paragraph 9 of the amended answer herein, together with interest on the several amounts therein stated from the respective months in which the sums therein stated were received by defendants to the present time, and complainant also prays that costs of this action be awarded him.

M. A. FOLSOM,
Solicitor for Complainant.

Service admitted.
GEORGE TURNER,
Solicitor for Defendants.

103 Endorsed: No. 326. In the Circuit Court of the United States for the District of Idaho, Northern Division. Kennedy J. Hanley, Plaintiff, *vs.* Empire State-Idaho M. & D. Co., *et al.*, Defendants. Motion of Complainant for Decree. Filed Oct. 27th, 1905. A. L. Richardson, Clerk. M. A. Folsom, Attorney for Complainant, Empire State Bldg., Spokane, Wash.

104 *Final Decree.*

In the United States Circuit Court for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Final Decree.

This cause came on for hearing upon the motion of the complainant for a decree, and it appearing that this court has heretofore sustained exceptions to the amended answer of defendants and has ordered them to plead further under penalties of a decree in favor of complainant, and it appearing that defendants have failed and refused to plead further, and complainant having moved for a decree for one-eighth of the amounts stated in Paragraph 9 of the amended answer with interest, and the said motion having been heard, it is hereby ordered, adjudged and decreed:

1. That complainant have and recover frim the defendant, Empire State-Idaho Mining and Developing Company, Forty-seven Thousand, One Hundred Sixty-three and nine hundredths Dollars ($47,163.09), together with interest thereon to date hereof, amounting to Seven Thousand Eight Hundred Thirty-nine and forty-one hundredths dollars ($7,839.41), making a total of Fifty Five Thousand, Two and fifty hundredths Dollars (55,002.50).

105 2. That complainant have and recover from the Federal Mining and Smelting Company the sum of Fifty-six Thou-

sand, Eight Hundred Seventy-two and Twenty-eight hundredths Dollars, (56,872.28) with interest thereon to date, amounting to Six Thousand Sixty-One and twenty-seven hundredths Dollars ($6061.27) making a total of Sixty-Two Thousand, Nine Hundred Thirty-three and fifty-five hundredths Dollars ($62,933.55).

3. That all moneys heretofore deposited by defendants or either of them under order of this court made August —, 1904, in the Spokane & Eastern Trust Company of Spokane, Washington, be and the same are hereby ordered returned to the said Federal Mining and Smelting Company by said Trust Company.

4. It is further ordered that complainant have and recover against the defendants his costs herein.

5. It appearing that the parties hereto have entered into a stipulation that the judgment herein shall bear no interest, it is so ordered.

Dated in open Court this 27th day of October, 1905.

JAS. H. BEATTY, *Judge.*

106 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.,* Final Decree. Filed Oct. 27th, 1905. A. L. Richardson, Clerk.

107 *Notice of Appeal.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,

vs.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and THE FEDERAL MINING AND SMELTING COMPANY, a Corporation, Defendants.

Notice of Appeal.

Come now the defendants, the Empire State-Idaho Mining and Developing Company, and the Federal Mining and Smelting Company, by their Solicitors, and give notice in open Court that they appeal from the final judgment in the above entitled cause, and from each and every part thereof, to the Supreme Court of the United States, and they pray that their said appeal may be allowed.

Whereupon it is ordered that the said appeal be allowed and that defendants give bond with one or more good and sufficient sureties in the sum of Five Hundred Dollars for the payment of costs on appeal.

It is further ordered that execution be stayed pending this appeal, pursuant to the stipulation of the parties heretofore filed in this cause.

Let this notice of appeal and order allowing the same be entered of record.

Done in open Court this 27th day of October, 1905.

JAS. H. BEATTY,
Presiding Judge.

108 Endorsed: No. 326. U. S. Circuit Court. Northern Division, District of Ohio. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.* Notice of Appeal and Order Allowing Appeal. Filed Oct. 27th, 1905. A. L. Richardson, Clerk.

109 *Assignment of Errors.*

In the United States Circuit Court for the District of Idaho, Northern Division.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Appellants,

vs.

KENNEDY J. HANLEY, Appellee.

Assignment of Errors.

The appellants in the above entitled cause, in connection with their appeal, taken in open Court and allowed by the Court, present and file herewith their assignment of errors, and say that in the record of the proceedings herein there is manifest error in that the United States Circuit Court erred in this, to-wit:

First. In sustaining the first exception to the amended answer.

Second. In sustaining the second exception to the amended answer.

Third. In sustaining the third exception to the amended answer.

Fourth. In sustaining the fourth exception to the amended answer.

Fifth. In sustaining the fifth exception to the amended answer.

Sixth. In sustaining the sixth exception to the amended answer.

Seventh. In making its order finding and holding that the
110 amended answer was insufficient and sustaining each of the exceptions thereto, and requiring defendants to file forthwith a further and sufficient answer on pain that complainant be awarded such relief as by the bill he might appear to be entitled to.

Eighth. In holding and deciding that the said amended answer failed to make a case showing that the Circuit Court of the United States for the District of Idaho was without power and jurisdiction to render the decree set up and pleaded in the bill of complaint, to-wit, a decree quieting title in complainant to an undivided one eighth interest in the Skookum Mine and to an undivided one-eighth interest in all ores and ore bodies within the vertical limits of the Skookum Mine, and that said decree to the extent aforesaid was void and of no effect, and in holding that, for the reason afore-

said, the defendants' exceptions to the amended answer numbered one, two and three were well taken, and in sustaining said exceptions.

Ninth. In holding and deciding that the matter in said amended answer set up in the fourth exception, was shown by the bill and answer to be *res judicata*, and in sustaining said exceptions for that reason.

Tenth. In holding and deciding that the matter set up in paragraph 3 of the amended answer was shown by the bill and answer to be *res judicata*, and in sustaining the fifth exception to the amended answer for that reason.

Eleventh. In holding and deciding that the matter in said amended answer, set up in the fourth paragraph thereof, was *res judicata* and in sustaining the sixth exception to the amended answer for that reason.

Twelfth. In rendering a final decree in the cause against the defendant, Empire State-Idaho Mining and Developing Company, for fifty-five thousand and two and 50/100 dollars, and against defendant, the Federal Mininh and Smelting Company, for fifty-six thousand eight hundred and seventy-two and 28/100 dollars, and for costs of suit, because of the failure of said defendants to
111 put in another and further answer.

Wherefore, the appellants pray that the final judgment and decree of said Circuit Court may be reversed in all things, and such order and decree rendered as is meet and agreeable to equity.

F. T. POST,
GEORGE TURNER,
Solicitors for Appellants.

112 Endorsed: No. 326. U. S. Circuit Court, Northern Division. District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.* Assignment of Errors. Filed Dec. 18th, 1905. A. L. Richardson, Clerk.

113 *Bond on Appeal.*

In the Circuit Court of the United States for the District of Idaho, Northern Division.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and FEDERAL MINING AND SMELTING COMPANY, a Corporation, Appellants,

vs.

KENNEDY J. HANLEY, Appellee.

Know all men by these presents, That we, the Empire State-Idaho Mining and Developing Company, a corporation, and the Federal Mining and Smelting Company, a corporation, appellants in the above entitled cause, as principals, and Francis J. Finucane, as surety, are held and firmly bound unto Kennedy J. Hanley, appellee in the above entitled cause, in the sum of Five Hundred ($500) Dollars,

lawful money of the United States, for the payment of which well and truly to be made, we hereby bind ourselves and each of us, and each of our heirs, administrators, executors, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of December, A. D. 1905.

Whereas, the appellants in the above entitled cause are prosecuting an appeal to the Supreme Court of the United States to reverse the final decree rendered and entered in said cause in the United States Circuit Court for the District of Idaho, on the 27th day of October, 1905.

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect, and shall answer all damages and costs if they fail to make said ap-
114 peal good, then this obligation shall be void; otherwise to remain in full force and effect.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY,
By W. CLAYTON MILLER, *General Manager.*
FEDERAL MINING AND SMELTING COMPANY,
By W. CLAYTON MILLER, *General Manager.*
F. J. FINUCANE. [SEAL.]

STATE OF WASHINGTON, *County of Spokane, ss:*

Francis J. Finucane, being first duly sworn, on oath deposes and says:

I am the surety named in and who signed and sealed the above and foregoing bond. I am worth the sum of five hundred dollars, in property situated in the State of Idaho, over and above all debts, dues, liabilities and exemptions.

F. J. FINUCANE.

Subscribed and sworn to before me this 15th day of December, A. D. 1905.

[SEAL.]

A. E. RUSSELL,
Notary Public for State of Washington, Residing at Spokane, Washington.

Approved:
JAS. H. BEATTY, *Judge.*

115 Endorsed: No. 326. U. S. Circuit Court, Northern Division, District of Idaho. Kennedy J. Hanley, *vs.* Empire State-Idaho M. & D. Co., *et al.* Bond on Appeal. Filed Dec. 18th, 1905. A. L. Richardson, Clerk.

116 *Return to Record.*

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all

things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is hereby transmitted accordingly.

Attest:

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON, *Clerk.*

117 *Clerk's Certificate.*

In the Circuit Court of the United States in and for the District of Idaho.

KENNEDY J. HANLEY, Respondent,

vs.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY ET AL., Appellants.

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 117 inclusive, contain true and correct copies of the Complaint, Summons, Demurrer of Federal Mining & Smelting Company, Demurrer of Empire State Company, Præcipe to set Demurrer for hearing, Order setting Demurrer for hearing, Opinion, Order overruling Demurrer, Answer, Stipulation extending time, Stipulation leave to amend answer, Amended Answer, Stipulation setting Exceptions, Exceptions to Defendants' Amended Answer, Order sustaining Exceptions to Amended Answer, Refusal of Defendants to plead, Motion of Complainant for Decree, Final Decree, Notice of Appeal, Order allowing Appeal, Assignment of Errors, Bond on Appeal, Return to record, and Clerk's Certificate, in the above-entitled cause which together constitute the transcript of the record herein upon appeal to the Supreme Court of the United States.

I further certify that the costs of the record herein amounts to the sum of $60.70 and that the same has been paid by the Appellants.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 23rd day of December, A. D. 1905.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON, *Clerk.*

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING CO. AND FEDERAL MINING AND SMELTING CO., *Appellants*,

v.

KENNEDY J. HANLEY, *Appellee*.

No. ~~998~~. 206.

Appeal from the United States Circuit Court for the District of Idaho.

APPELLANTS' BRIEF ON THE MERITS.

GEORGE TURNER,
F. T. POST,
Attorneys for Appellants.

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No. 595.

Appeal from the United States Circuit Court for the District of Idaho.

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STATEMENT OF THE CASE

The appellee, on the 9th day of March, 1898, brought his bill of complaint in the United States Circuit Court for the District of Idaho against Charles Sweeny, F. Lewis

Clark and the appellant, Empire State-Idaho Mining and Developing Company, alleging title in himself to two separate and district interests in the Skookum lode mining claim, a mining property in Shoshone County, Idaho, the first and larger interest being a one-third interest, the other a one-eighth interest. He alleged, with reference to the one-third interest, that defendants Sweeny and Clark had acquired a record title against him and the possession of the property by and through certain proceedings in the Probate Court of Shoshone County, Idaho, to which he was not a party, and of which he was not cognizant, and which were, therefore, void and of no effect. The allegations with reference to the one-eighth interest were that defendants Sweeny and Clark procured from him a conveyance to themselves of said interest by fraud, covin and deceit, in that they had violated the terms of an escrow agreement made by him for the sale of said interest, and abstracted the deed for said eighth interest from the escrow depository without complying with the terms of the agreement, and, further, that the said escrow agreement was entered into by him as the result of fraudulent misrepresentations and deceit practiced on him by said Clark and Sweeny.

Record, pp. 23 to 34, both inclusive.

The case was brought to issue and tried, resulting in a judgment in the lower court in favor of the defendants. On

appeal to the Circuit Court of Appeals the judgment of the lower court was reversed as to the one-eighth interest, but affirmed as to the one-third interest, and the case remanded to the lower court with instructions to proceed in conformity with the opinion. See 109 Federal Reporter, 712. Thereupon certain proceedings in the action were had in the Circuit Court, resulting in a judgment in the case that the defendants "have and each of them has no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim *and the ores therein contained;* that the complainant Kennedy J. Hanley since April 30, 1898, has been, and now is, the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him."

Record, p. 49.

The said judgment also awarded to Hanley as a money recovery the sum of $260,672.43, which sum was subsequently paid, as alleged in the answer in the present case.

The present suit is for an accounting for ores mined since the date of the former judgment, and is based on allegations in the bill asserting ownership of the complainant to an eighth interest in the mine and the ores therein contained, and on the decree in the former suit quieting title of com-

plaint to said one-eighth interest in the said mine and said ore bodies.

The answer denies the ownership of complainant in the ore bodies from which the defendant mined the ores, alleges that said ore bodies belong to another mine, the San Carlos, the property of the defendants, by reason of the fact that they are part of a vein which has its apex in the said San Carlos mine, and which does not apex in the Skookum claim; and, with reference to the decree in the former suit, the answer alleges that the court was without jurisdiction to render a decree quieting the title of complainant to the ore bodies in the mine because the bill of complaint in that suit made no case for the quieting of title to said ore bodies. The answer sets forth the bill, answer and replication in the former suit, and the facts in that suit leading up to the judgment in support of the contention that the court was without jurisdiction in that suit to render a decree quieting title to the ore bodies in the mine.

The sole question in the case is whether, on the facts set up and pleaded in the answer, there was jurisdiction in the United States Circuit Court in the former suit to render the judgment quieting in the complainant Hanley title to one-eighth of *all* the ore bodies found within the boundaries of the Skookum mining claim. The lower court thought the answer failed to show want of jurisdiction and sustained com-

plainant's exceptions. The propriety of determining that question on an exception to the answer seems to have been settled in the affirmative by the opinion of this Court in In re *Sanford Fork & Tool Co.*, 160 U. S., 147. But however that may be, the defendants are the injured parties if that method of procedure be erroneous, and they make no question here and now against it. Complainant might have brought the case on for hearing on the bill and answer, and thereby tested the sufficiency of the answer, and the method adopted was equivalent to that course, and it has been so held in a number of cases.

In order that this Court may clearly understand the point in controversy, a further statement of facts occurring in the former suit will be valuable. On the first trial of the case in the Circuit Court the proofs both of complainant and defendant were devoted wholly to the principal equities of the bill, viz., the allegations concerning the proceedings in the Probate Court with reference to the one-third interest, and the allegations of fraud and deceit with reference to the one-eighth interest. Nothing was done toward fixing the money recovery to which complainant would be entitled in case he prevailed or toward fixing the amount or value of ore extracted by the defendants or its status as belonging to the Skookum claim or to some other claim. After the Circuit Court of Appeals had reversed the judgment of the Circuit

Court rendered in that trial, a reference of the case to a Master was made by the Circuit Court to take an accounting. At said accounting the defendants offered to prove that certain of the ores extracted by them from within the boundaries of the Skookum claim belonged to a vein which apexed in the San Carlos mining claim, another claim which belonged to defendants; that said vein did not apex in the Skookum claim and did not belong to it, and that for the reason aforesaid the complainant had no interest in the said ores, and was entitled to no recovery therefor. At this stage of the case, upon a showing made by the defendants, the character of which is now immaterial, proceedings before the Master were suspended by order of the Circuit Court; whereupon the complainant, Hanley, filed his petition in the said Circuit Court of Appeals for a writ of mandamus directed to Hon. James H. Beatty, Judge of the United States District Court of Idaho, sitting as Circuit Judge, requiring said Judge and said Court to proceed with the said accounting, and such proceedings were had on said petition that thereafter the said Circuit Court of Appeals handed down an opinion in which it was held and decided that complainant was entitled to have the mandate of the Circuit Court of Appeals enforced by an immediate accounting, and in which it was held and decided, *for the first time*, that the bill of complaint was one to quiet the title of Hanley in the Skookum Mining claim

and to *all* the ore bodies therein and within the vertical lines thereof, and that the defendants, having failed to set up in their answer that the ore bodies worked by them within the vertical lines of the Skookum claim belonged to a vein which had its apex in another and adjoining claim of defendants, such failure estopped defendants to show that fact on the accounting.

The opinion of the Circuit Court of Appeals will be found published in *Hanley v. Beatty* (District Judge) 117 Federal Reporter at page 59. Subsequent proceedings in the Circuit Court were governed in every respect by the opinion of the Circuit Court of Appeals in the mandamus case, and the right of defendants to show that the ores mined by them did not in fact belong to Hanley, but to them, the defendants, was cut off and denied to them, *Hanley v. Sweeny*, 126 Fed., 100. If the case made in original bill as to the one-eighth interest was one to quiet the title of Hanley to the Skookum claim and *all* the ore bodies contained within the vertical limits thereof, then defendants in this case are estopped to further litigate that question; but, if not, then the right remains to them to litigate the question of the ownership of the said ore bodies here, as they claimed the right to litigate the same question in the former suit.

ARGUMENT.

First. The bill in the original suit, so far at least as it had reference to the one-eighth interest, was not one to quiet title.

(a) We submit that the most careful and hypercritical pleader would fail to percieve in the allegations of the bill as to the one-eighth interest, anything more than an invitation to come into court and litigate with complainant the question of fraud in the procurement of the deed to said eighth interest set up in the bill. The bill does not proceed on the theory of a bill of peace, which is that the complainant is entitled to repose from litigation, or on the theory of a bill *quia timet*, which is the prevention of anticipated wrongs or mischief, but it proceeds on the theory of the right of complainant as actor and moving party, to have redress for wrong and mischief already committed. The allegation is that complainant was induced to make the deed to the eighth interest by fraudulent misrepresentations and concealment and that after he had made the deed it was fraudulently abstracted from the escrow envelope, and the prayer is that the deed be declared void and of no effect, and for an accounting of complainant's share of the proceeds of the ore mined since the making of the deed. The allegations concerning ore bodies in the mine and their value, and the fact that defendants were working out the ore, which constitute the balance of the bill, with one exception

to be hereafter noticed, were all in aid of the right to an accounting, or to the temporary relief of an injunction and receiver sought in the prayer of the bill. There is one allegation which would be proper in a bill of peace and which alone gives color to the claim that the bill was technically one to quiet title. That allegation is the concluding one in the bill and is as follows: "The said defendants claim an estate or "interest in *said* undivided one-eighth interest in said 'Skoo-"kum' claim adverse to your orator, which claim of said de-"fendants is without any right whatever, and that said de-"fendants have not any estate, right, title or interest what-"ever in said land and premises, or any part thereof, the "property of your orator, as aforesaid." The bill had already set up that defendants were in possession of the property claiming title to his eighth interest under the deed procured from him by fraud, and what other estate or interest could defendants assume he meant by his concluding allegations than that particular estate or interest. It is true that this last allegation was supplemented by one of the prayers of the bill, "that defendants be required to set forth the "nature of their claims to said premises and that all adverse "claims of said defendants may be determined by the decree "of this Court," etc., but that prayer defendants were entitled to consider as outside the scope of the bill or as simply requiring them to answer the allegations of fraud set up in the bill.

Scandalous and impertinent averments in a bill, unless they amount to setting up a second distinct and perfect cause of action, do not constitute multifariousness. Hence it is said to be proper in such case to answer to the matter within the jurisdiction of the Court and to demur to the other for want of equity, or to answer to both and make exceptions to the want of equity in the latter, at the hearing:

Story's Equity Pleading, 10 Ed., Sec. 283, and authorities cited in note.

Defendants felt justified in following the latter course in this case, but were deprived of the opportunity to object after hearing, to the impertinent allegations, by the holding in the mandamus case that those allegations gave the bill the aspect of one to quiet title.

Pleadings in equity as at law are construed most strongly against the pleader, and where the bill contains general and specific allegations as to the same matter, the general allegations will be referred to the particular and specific ones:

Story's Equity Pleadings, 10 Ed., Sec. 28, note 5.

What then would any good pleader understand the bill to mean? If it were alleged simply that complainant owned an undivided one-eighth interest in the Skookum claim and all ore bodies within the vertical lines thereof, and that defendants claim to have some right, title or interest therein,

and that such claim of the defendants therein was without right, there would be some ground for the contention that a bill of peace was intended by the pleader. But it is alleged that the complainant being the owner of one-eighth interest in said mining claim, the defendants, by certain means set out in the bill at great length, had defrauded him out of said interest, and were in possession of said claim under said fraudulent deed, despoiling it of its ore, and undoubtedly we were entitled to construe the general concluding averment that "the "said defendants claim an estate or interest in said undivided "one-eighth interest," etc., as referring wholly and entirely to the circumstances of their claim under the alleged fraudulent deed.

(*b*) But if the bill can be construed as one to quiet title it cannot be construed as one to quiet title to more than the mining claim and to the ore bodies which properly belonged to the mining claim. The only allegations concerning ore bodies found in the bill are:

1. An allegation that the works carried on by defendants in another mine had penetrated into the Skookum ground and "had disclosed an immense body of ore of great value," and that Clark and Sweeny had willfully falsified and misstated the facts concerning the mine in order to defraud complainant of his interest.

2. An allegation that "the ores contained in said Skoo-

"kum mine are of such value that there has been taken out of "said ore body thus disclosed in said ground up to the present "time, ore of the value of not less than $150,000 net, over "and above the cost of mining, treating, extracting and mar- "keting the same, of which your orator is entitled to the "share represented by his interest in said Skookum mine here- "tofore set forth."

3. An allegation that the defendant, the Empire State-Idaho Mining & Developing Company, "has been engaged "in working and mining the ores contained as aforesaid in "said Skookum mining claim, under the supervision and di- "rection of said Clark and Sweeny," etc.

4. An allegation "that the defendants give out and "assert that they have many million dollars worth of ore in "sight therein (in the Skookum mine) and that they intend to "take the same to their own use."

5. An allegation "that said described property is of no "value except for the ore it contains and that the defendants "are rapidly exhausting the same," etc.

6. An allegation "that said defendant company, acting in "conjunction and under the direction of said Sweeny and "Clark are working a force of no less than one hundred "miners and workmen in taking the ores out of said ground, "and despoiling it at a rate that will be destructive of your

"orator's interest therein unless they are prevented by this "Court," etc.

7. An allegation "that the ore body of said 'Skookum' "mine now being worked and despoiled by the said corpora- "tion defendant, is approached by a tunnel passing through "the 'Last Chance' mining claim and penetrating the 'Skoo- "kum' claim, called the 'Sweeny Tunnel,' and that said "tunnel is under the control of defendants," etc.

The first of these seven allegations constitutes a part of the statement of the alleged fraud perpetrated on complainant. The other six allegations were clearly inserted for the purpose of showing the right to an accounting, the large proportions which the same would assume, and the right of complainant to the temporary injunction and receiver prayed for in the bill. It is incredible that, on such allegations, complainant meant to make a case for quieting title to the ore bodies referred to by him, against the right of some other claim to these ore bodies by reason of the vein or lode to which the ore bodies belonged, apexing in the other claim. If he did not intend to make such a case, then it was not the duty of the defendants to respond to such a case in its answer. In this connection we call attention to the concluding allegation in the bill, which alone gives it the aspect of a bill of peace. "The said defendants claim an estate or interest in *said* "undivided "one-eighth interst in said 'Skookum' claim adverse to your

"orator," etc. Nothing is said about the ore bodies. In the prayer to have title quieted there is the same failure to mention ore bodies. The interest to be quieted is described there as "*said* undivided interest of your orator in said 'Skookum' claim."

In this view of the case there was no obligation on the part of the defendants to set up title to the ore bodies separate and apart from their title to the claim.

(*c*) If on general allegations like those in this bill of complaint the right of adjoining owners may be foreclosed and estopped, then the policy of the statutes of the United States on the subject of the ownership of ore bodies may be easily defeated. Can the owner of one of several undeveloped claims on a mountain side bring an action against owners of the adjoining claims to quiet title to the ore bodies lying beneath the surface of his claim, and by judgment in such action prevent the operation of the law that the adjoining owners are entitled to follow veins apexing within their claims into other adjoining claims? If he may do that, can he, by simply alleging in said action that his claim contains ore bodies of enormous extent and great value, throw on the owners of the adjoining claims the burden of alleging and proving, at the risk of being forever estopped, something that they do not know, namely, that the ore bodies referred to in the bill belong to a vein which apexes in their ground?

Suppose in such a case that at the time of filing the answer the defendant was working in an ore body that had its apex within the claim in question, and had no knowledge of any other ore bodies, and that after final judgment in that case there should be discovered other ore bodies lying within the vertical lines of his claim, which had their apex in another mining claim belonging exclusively to the defendant, and which claim was so located as to its side lines and end lines that the owner thereof would have the right under the statute to follow the vein outside of the side lines of that claim to the ore bodies in question, would the defendant in that case be estopped to assert title to these newly discovered ore bodies by reason of his failure to set up those facts in his answer? Can the provision of Section 2322 of the U. S. Revised Statutes be thus nulified?

These considerations show the utter fallacy of the view taken by the Circuit Court of Appeals, that failure of defendants in this action to set up affirmatively the apex question estopped them to take advantage of the question on the accounting.

(*d*) That the bill cannot be considered as one to quiet title is settled, we think, by the decision of this Court in the case of *Boston & M. Consolidated C. & S. M. Co. v. Montana Ore Purchasing Co.*, 188 U. S., 632. In that case as

in this, the attempt was made to bolster the case of the complainant by claiming that the bill was one to quiet title, but this Court disposed of that contention by an analysis of the bill, showing that another and different cause of action was set up in the bill, and also by the statement that the bill was fatally defective as one to quiet title, because it did not show that the complainant's title had been established at law and it did show that complainant was out of possession and that defendant was in possession of the property in dispute. The decision might have been made in this case because it covers all phases of the question as presented in these subheads, "a," "b," "c" and "d."

Second. The bill not being one to quiet title, either to the mine or the ore bodies therein contained, and certainly not to the latter as against some other mine claiming the apex, on well recognized and well established principles there was no jurisdiction in the court to make a decree quieting the title to said ore bodies.

Reynolds v. Stockton, 140 U. S., 254.
Munday v. Vail, 34 N. J. Law, 418.
Unfried v. Hebeau, 63 Ind. 67.
Smith v. Ontario, 18 Blatchford, 454.
Packet Co. v. Sickles, 24 Howard, 333.
Ex parte Lange, 18 Wall, 163.
Gifford v. Hart, 1 Sch, & Lef., 386.
Gore v. Stackpole, 1 Dow, 18.

Colclough v. Sterum, 3 Bligh, 181.
Seamster v. Blackstock, 83 Va., 232.
Wood v. Stanberry, 21 Ohio St., 142.
Fithian v. Monks, 43 Mo., 502.
Boswell. v. Dickerson, 4 McLean, 262.
Co. Litt. 352 b.
Freeman on Judgments, Vol. 1, Sec. 242.

Jurisdiction of any court exercising authority over a subject may be inquired into in every court where the proceedings of the former are relied on and brought before the latter by one claiming the benefit of such proceedings.

Elliott v. Piersol, 1 Peters, 341.
Lessee of Hickey v. Stewart, 3 Howard, 762.
Guaranty Trust, etc., Co. v. Green Cover, etc., R. R. Co., 139 U. S., 147.
Thompson v. Whitman, 18 Wall. 467.

Third. But another principle has been established by this Court which will serve us as well as to have the decree in the former case declared void and ineffective. It has been held that a decree in equity must be considered in connection with the pleadings and if broader than required will be limited by construction so that its effect will be such only as is needed for the purposes of the case made and issues decided.

Barnes v. Chicago, etc., Ry. Co., 122 U. S., 14.

The decree in this case undertakes to quiet title not only to the interest in the mining claim asserted by the complainant, but to "the ores therein contained."

Manifestly, there was no issue in the case requiring or permitting the quieting of title to the ores in the mining claim as aginst some other mine claiming the apex of the vein, of which some of the ores within the boundaries of the mine formed a part. That question was not in the mind of any body at the time the issues were joined in the case; therefore, if the case were one for quieting title at all, it was simply to the Skookum claim and the ores therein which belonged thereto. If the decree be thus limited by construction, and it does no violence to its language to so limit it, then there is no estoppel created by the decree against our now asserting in the present case title to a part of the ores lying within the boundaries of the Skookum claim, by virtue of our ownership of another patented mining claim in which the ore vein apexes.

Respectfully submitted,

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F. T. POST,

Attorneys for Appellants.

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MYRON A. FOLSOM,
Attorney for Appellee.

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Appeal from the United States Circuit Court for the District of Idaho.

APPELLEE'S BRIEF ON THE MERITS.

STATEMENT OF FACTS AND QUESTIONS INVOLVED.

This suit was brought in the Circuit Court for the District of Idaho by Hanley as owner of an interest in a mine called

the Skookum, to secure an accounting from his co-tenants, the Empire State Company and the Federal Company, and a decree for his share of the profits made by them in working the property. He also sought an injunction and other relief. He alleged that he was the owner of an one-eighth interest in the mine and ores, and that his ownership had been settled in a former suit in the same Court wherein he was complainant and Sweeny, Clark and Empire State-Idaho Mining & Developing Company (one of the appellants here) were defendants. The appellant Federal Company acquired its title through the first named company subsequent to the decree in the former suit.

The defendants in this suit admitted in their amended answer that they had extracted and sold a large amount of ore from the property; and admitted that

"If the decree pleaded by complainant in paragraph eight "of the bill be a valid decree and have force and effect, to "the extent of quieting title to said Skookum mining claim "and the ores beneath the surface thereof, that the title of "complainant to said ores was quieted and that he is entitled "to have judgment for one-eighth of the net value thereof as "in this paragraph admitted." (Folio 43½.)

A copy of the former decree was attached to the amended answer. It adjudged that a former conveyance between the parties to that suit should be cancelled; that defendants had

no interest in the portion of the mine and ores claimed by Hanley, and that the latter was the owner of an interest in the mine and ores, and his interest was quieted in him. He was awarded one-eighth of the value of the ores removed from the property.

The Circuit Court held in the present case that the decree in the former suit was "a valid decree" and had "force and "effect to the extent of quieting Hanley's title," and therefore a decree was entered herein in favor of Hanley for his share of the proceeds as admitted.

The only question presented by this appeal is the question of the jurisdiction of the Circuit Court to enter the former decree. Appellants contend that the Court in the former case had no jurisdiction to settle Hanley's title either to the mining claim or the ores contained within it, because it is contended that

(*a*) The bill did not purport to be an action to quiet title.

(*b*) The bill did not make a case for quieting title.

(*c*) No opportunity was given defendants to litigate the title to the ore bodies before the decree was rendered.

(*d*) The bill showed that defendants were in exclusive possesison of the premises and complainant was out of possession, and therefore, an action of law alone would lie.

(*e*) The decree therefore deprived defendants of their property without due process of law.

Our contentions are that the court in the former case acquired jurisdiction as a court of equity to cancel a deed on the ground of fraud, and could therefore properly retain jurisdiction to determine Hanley's title to the property, according to the prayer, even though in so doing questions might be investigated, which ordinarily should be tried in a court of law; that the bill tendered an issue as to the ownership of the ore bodies, and defendants failed to assert in their answer that they had title by virtue of owning other claims containing the apex of the ledge; and, in addition expressly admitted that the title to the ores was the same as the title to the claim. We contend further that the Court having had jurisdiction of the parties and subject matter in that suit, and the question of the adequacy of the legal remedy not having been raised by the parties at the outset, was waived. The question at most is one rather of the defective exercise of jurisdiction than of the entire absence of it.

It will be necessary, therefore, to examine the pleadings and decree in the former case to determine the scope of the suit and the matters which were conclusively settled by it.

Hanley as complainant brought suit in equity against Sweeny, Clark and the Empire State-Idaho Mining & Developing Company, in the Circuit Court for the District

of Idaho, and asserted ownership of an undivided one-eighth interest and an undivided one-third interest in the Skookum mining claim, and the ores therein contained, said claim being in Shoshone County, Idaho. As to the one-third interest Hanley claimed under certain proceedings in the Probate Court of that county which were without notice to him, as he said, set aside and the interest conveyed to the Chemung Mining Company, and by the latter to the Empire State, etc., Company. Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under patent from the United States. The interest Hanley had conveyed to Sweeny and Clark by a deed deposited in the Exchange National Bank of Spokane, to be delivered on certain specified conditions, and he averred that Sweeny and Clark obtained possession of the deed wrongfully and contrary to the escrow agreement, and afterwards made a pretended deed of the interest to the Empire State Company. He alleged further that he had been induced to place the deed in escrow as a result of fraudulent representations by Sweeny and Clark, who at the time were his co-tenants, as to the value of the mine. Hanley alleged that the ores contained in the Skookum mine were of such value that there had been taken out of the ore body disclosed in the Skookum mine not less than $150,000 net, prior to March, 1899, over and above the cost of mining, treating and marketing the

same; that the defendants had given out and asserted that they owned the Skookum claim and that he had no interest in it; that they had many million dollars worth of ore in sight and intended to take the same to their own use. He alleged further that the property was of no value except for the ores contained therein and that the defendants were rapidly exhausting the same to the utter destruction of his rights; that Sweeny and Clark had organized the corporation defendant under the laws of the State of New York and the latter corporation had *been engaged in working* the ores *contained in the Skookum claim* under the general supervision and direction of the defendants who were the officers of the said corporation. *That defendants claimed an estate or interest adverse to the interest of complainants which claim was without right.* The bill prayed that the conveyance by the complainant to the defendants, Sweeny and Clark, be set aside and declared null and void from its date; that the defendants be held to account for the complainant's *share of the proceeds of the said Skookum mine* taken therefrom by the defendants after the time the escrow deeds were made and prior to the filing of the bill of complaint; *that the defendants should be required to set forth the nature of their claim to said premises and that all adverse claims thereto should be determined by a decree of court;* that by the decree it should be declared and adjudged that the defendants and

each of them had no estate or interest whatever in or to complainant's interest in said Skookum claim, and that the title of complainant was good and valid thereto and therein; that the Court should appoint a receiver to take into possession and control the Skookum mine and workings, and continue the operation of the mine, and that defendants be temporarily enjoined from working the property.

The defendants denied all of the allegations of fraud and misrepresentation and all allegations charging fraud in the transactions relating to the deposit of the deeds and stock in escrow. They alleged that by virtue of good and sufficient mesne conveyances the defendant, Empire State Company, was the owner of the Skookum mining claim and every part thereof. They denied that the amount alleged had been taken out of the Skookum mine, but alleged that no ore of known value had been disclosed in the ground at the time of making the contract and placing the deeds in escrow. As officers and agents of the corporation the defendants, Clark and Sweeny, admitted that they intended on behalf of the corporation to extract the ores from the Skookum mine and property and appropriate the same to the use of the corporation, the owner of the claim. They admitted *"that since the ..... day of....., 1898, the said "corporation defendant has been engaged in working and*

"mining the ores contained in the Skookum mining claim." A replication was filed and testimony taken.

On hearing the Circuit Court decreed against Hanley as to both interests. Hanley carried the case to the Circuit Court of Appeals which held that he was not entitled to relief as to the one-third interest but that he was as to the one-eighth interest. The decree was therefore reversed and cause remanded for further proceedings. (109 Fd., 712.) The case went back and was referred to a master for an accounting as to the one-eighth interest. Subsequently the Circuit Court suspended the accounting and refused to proceed with the case because the judge was uncertain as to whether plaintiff was entitled to an accounting because defendant claimed that the ores were part of a vein apexing in the San Carlos claim in which Hanley had no interest. Hanley applied to the Circuit Court of Appeals for a writ of mandamus to compel the trial judge to proceed and the latter stated the question in his return. The Court of Appeals held that the suit was one to determine all adverse claims and quiet title as well as to cancel the deed; that the complainant had tendered the issue as to the ownership of the ore bodies underneath the surface of the Skookum, and the defendant having failed to allege and prove in the original trial individual ownership by reason of owning the San Carlos claim, asserted to contain the apex of the vein, they could

not on the accounting set up such a defense. (109 Fed., 712.)

The master thereupon proceeded with the accounting and reported a large amount of money as due to Hanley. The Circuit Court reduced the amount by deducting the cost of working the property while Hanley was excluded from the mine, and in November, 1902, entered a decree quieting Hanley's title to the one-eighth interest and giving him judgment against the Empire State Company for the last named amount. Defendant appealed from this decree and filed a supersedeas bond with the American Bonding Company of Baltimore, as surety, and Hanley prosecuted a cross appeal questioning the deduction. The Circuit Court of Appeals sustained the cross appeal and held that the Circuit Court erred in allowing defendants their working costs. (126 Fed., 97.)

The case was remanded with instructions to modify the decree. This was done (May, 1904) and recovery of the original amount decreed, and also recovery against the surety on the bond of so much of the amount as the bond was given to secure, and another appeal was taken by the company to the Court of Appeals which confirmed the decree. An appeal was thereupon taken from the Court of Appeals to this Court, which appeal was dismissed for lack of jurisdiction. (198 U. S., 292.)

ERRORS OF FACT IN APPELLANTS' BRIEF.

Appellants state in their brief that while the decree in the former suit may have settled the title to part of the ores under the Skookum that it did not settle title to *all*. That is, the title was not quieted to such as apexed outside. But defendants did not attempt in the former suit to show that the ores belonged to two different veins, or that the ores were differently situated. They attempted to show that *all* ores apexed outside. In the present suit the ores are all treated as belonging to a single vein. Thus (Record p. 18, folio 37) they allege: "That none of said ore bodies belong to any "vein or ledge having its apex within the Skookum mining "claim, but all of said ore bodies extracted," etc. The ore bodies all belong to the same vein and there is but one vein according to the pleadings and according to the truth.

Appellants state (p. 6 of their brief):

"At said accounting the defendants offered to prove that "*certain* of the ores * * * belonged to a vein," etc.

This is not strictly true. They offered to prove that *all* ores in the Skookum apexed outside the Skookum in the face of their answer in that case that the ores were "contained "in the Skookum claim," and intended to appropriate them because they owned the Skookum claim.

And in their answer in this case they state that they

offered to prove that "the ores" taken from the claim, *not certain* of the ores, were a part of another vein. (Folio 20.)

On page 5 of their brief appellants say with reference to the first trial of the former case:

"Nothing was done * * toward fixing the amount "or value of ore extracted, or its status as belonging to the "Skookum claim or to some other claim."

If the Court will refer to the record used on application to this Court for a writ of certiorari, Oct. Term, 1901, No. 494, page 95, folio 170, it will find that testimony was offered as to the amount; and on pages 226 and 297 testimony for the purpose of fixing the status of the ore as belonging to some other claim.

ARGUMENT.

(A) THE BILL IN THE FORMER CASE PURPORTED TO BE ONE TO DETERMINE ADVERSE CLAIMS AND TO QUIET HANLEY'S TITLE, AND MADE A CASE FOR DETERMINING ADVERSE CLAIMS AND QUIETING TITLE.

The jurisdiction of the Court was invoked in the former case upon the ground of diverse citizenship. The property was situated in the State of Idaho, and the complainant resided in that state. The cause of action was therefore one which could properly be brought in the United States Circuit

Court for that district. The sole question is whether, on the equity side, the Court could grant the relief sought by complaint.

Inasmuch as the suit was brought for the purpose of cancelling a deed, possession of which had been secured by fraudulent misrepresentations, there can be no doubt under well settled rules that a court of equity would have jurisdiction for that purpose, regardless of who was in possession. But appellants insist that the Court could not quiet the title or determine adverse claims because the complainant alleged that the defendant was in possession of the property and that the complainant was excluded from possession. There are three sufficient answers to the contention of appellants:

(1) The complaint alleged that Hanley was the owner of a one-eighth interest in the claim and in the ore bodies and that defendants were in possession of the premises and claimed some interest in the same. The complaint prayed that all adverse title to the mine and mining claim which of course referred to the only valuable thing contained therein, to-wit, the ore, should be determined. The only importance of the contention as to plaintiff's possession is its bearing upon the question of whether the suit should have been brought at law or in equity. *The defendants did not demur to the complaint on the ground that there was a remedy at law or upon any other ground but appeared and filed their*

answer, entered upon a full defense, and submitted to the jurisdiction of the Court on the equity side. By so doing they waived the question that the suit could not quiet the title or determine adverse claims by reason of a want of allegation as to possession.

Perego v. Dodge, 163 U. S., 160;
Reynes v. Dumony, 130 U. S., 505;
Kilbourn v. Sunderland, 130 U. S., 594;
Detroit v. Detroit Ry. Co., 184 U. S., 368.

(2) The Circuit Court had undoubted jurisdiction on the equity side regardless of the allegation of possession or want of possession to annul the deed procured by gross fraud. Having acquired jurisdiction on one undoubted equitable ground, the Circuit Court had power to retain the suit for the purpose of determining adverse claims to the property under the Idaho statute regardless of questions of possession. If the Court's jurisdiction had been invoked on the equity side solely for the purpose of determining title, the plaintiff might have been denied relief on the ground that he had an adequate remedy at law, yet having acquired jurisdiction upon the equity side the Court could retain the case for the purpose of determining other questions even though they should be legal questions including the question of title. The Idaho statute providing for the determination of adverse claims does not require the plaintiff to be in possession or the de-

fendant out of possession. It requires merely an allegation that the plaintiff is the owner and that the defendant claims some adverse interest.

Coleman v. Jacques, 85 Pac., 894 (statute identical with that of Idaho);
Fry v. Summers (Ida.), 39 Pac., 1118;
Ely v. Ry. Co., 129 U. S., 291.

While it may be true that if the United States Court on the equity side had no other ground of jurisdiction it would not enforce the statute, yet where it has acquired jurisdiction upon independent equitable grounds, it is authorized to enforce the provisions of the state statute.

Wehrman v. Conklin, 155 U. S., 314;
Roberts v. N. P. Railway Co., 158 U. S., 1;
Bardon v. Land & River Imp. Co., 158 U. S., 1;
Rich v. Braxton, 158 U. S., 375;
Cowley v. N. P. Ry. Co., 159 U. S., 599;
Robb v. Voss, 155 U. S., 13;
Smith v. Ames, 169 U. S., 466;
Missouri K. & T. Co. v. Krumseig, 172 U. S., 351;
Devine v. Los Angeles, 202 U. S., 313;
Greely v. Lowe, 155 U. S., 50;
Chapman v. Brewer, 114 U. S., 150;
Logan Co. v. Great Southern Co. (C. C. A.), 126 Fed., 623;

Bix Six Co. v. Mitchell, 138 Fed., 283 (C. C. A.);
Southern Pac. Co. v. U. S., 133 Fed., 657 (C. C. A.);
Hudson v. Randolph (C. C. A.), 66 Fed., 216;
Peck v. Ayer, 116 Fed., 273;
Harding v. Guice, 80 Fed., 162 (C. C. A.);
Randolph v. Allen, 73 Fed., 23, 31;
Gunn v. Brinckely Co., 66 Fed., 382.

The foregoing cases all recognize the doctrine of *Whitehead v. Shattuck,* 138 U. S., 146, but they distinguish that case on the ground that there was a plain and adequate remedy at law and there was no occasion for resorting to a court of equity either to establish plaintiff's right to the land or put him in possession. In other words, the court of equity in that case had no jurisdiction upon any independent ground and therefore could not enforce the state statute.

The case of *Boston & Montana Co. v. Montana O. P. Co.,* 188 U. S., 632, has no bearing upon this case. There the jurisdiction of the Circuit Court was invoked on the ground that defendants asserted claims which would involve a federal question. This anticipation of the position of the defendants was attempted to be justified by the claims that the suit was one to quiet title and in that view of the case it was necessary to set forth the pretensions of defendant. *The question of jurisdiction on the equity side was raised at the outset.* We concede that the bill in that case was not one to

quiet title or to determine adverse claims. It did not even pray for such relief or call upon defendant to set up its title. The state statute of Montana was held not to apply because the Federal Court of equity in that case had no jurisdiction on any independent ground, and having no jurisdiction on any independent ground could not administer the equitable remedy provided by statute where the defendant was in possession, and where to apply that statutory remedy would make it the sole support of the jurisdiction of the Federal Court over the case. In that case the Federal Court had no jurisdiction even on the law side of the Court. (188 U. S., 632, 638.)

If the Circuit Court in that case had acquired jurisdiction of the parties by reason of diverse citizenship and the suit had been brought on the equity side of the Court upon allegations of fraud and with a prayer for the cancellation of the deed and determination of the title, this Court would undoubtedly have held that the Montana statute could have been enforced.

Smith v. Ames, 169 U. S., 466.

At one stage of the present litigation one of the judges used language with reference to the pleadings which states the issue so clearly that we adopt it as our own:

"Was there anything beyond the surface title in issue? "The complaint refers to the 'ores contained in said Skookum

" 'mine.' That the ore body of said Skookum mine now
" 'being worked,' etc. Also there is other mention made
"therein of the ores. The answer admits mining ores con-
"tained in said Skookum mining claim. In addition to this,
"a valid claim, and this claim being patented is presumed to
"be such, must contain an ore bearing ledge. An action for
"an interest in such a mining claim implies that it is also
"for the ores belonging to it. In the absence of allegations
"distinctly showing that only the surface title was in litiga-
"tion, the conclusion from the pleadings and the trial is, that
"the action was for an interest in the mine, together with all
"that is legally a part of it, and that the decree carried with
"it all the rights and property interests that in law belong
"to the Skookum mine, the law being that *the ores under the*
"surface of a mining claim are a part of it, until it appears
"that they are a part of a ledge apexing in some other claim.
"It follows in this case that the ores under the Skookum
"claim belong to it, and that they were involved in the action.
"* * As above suggested, the action by complainant was
"for the purpose of having his title determined and quieted.
"He sets out his title and challenges defendants to set out
"theirs, that the claims of all the parties, as they then existed,
"might be adjudicated. If now, defendants having a number
"of defenses, may plead one, holding the others in reserve
"as a menace to complainant's title, the object of his action

"is lost. He obtains no settlement of his title and the promise "of the law that he shall have such, is a delusion. If a de- "fendant can do that as to one defense he may continue the "process as long as his separate defenses hold out. Litigation "instead of being limited would border on the limitless. It "is coming into direct conflict with the vital principle of "equity that multiplicity of suits must be avoided."

(3) In order to make out a *prima facie* case to recover the values of ores underneath the surface of a patented mining claim, all that is necessary to show is ownership of the claim, the fact that it is patented and the fact that defendant has removed ores. From such a showing the presumption is that the ores are a part of the claim and the burden is upon the defendant to show by pleading and proof that the ores are a part of a vein apexing in another claim which is so located as to give the owner extralateral rights.

Boston & Montana Co. v. Montana O. P. Co., 188 U. S., 632, 638;
Elgin v. Iron Silver Co., 118 U. S., 196;
Doe v. Waterloo, 54 Fed., 935;
Parrott v. Heinze, 64 Pac., 329;
Wakeman v. Norton, 49 Pac., 283;
Maloney v. King, 64 Pac., 351.

The defendants did not affirmatively plead in their answer that the ores were a part of the claim which they owned

and which was so located as to have extralateral rights. The title to the ore bodies within the entire Skookum claim was therefore, conclusively settled by failure to plead an adverse title thereto in a suit brought to determine all adverse claims to such ore bodies, "since all defenses then existing to the "asserted right whether brought to the attention of the Court "or waived, were foreclosed by the decree."

Gunter v. Atlantic Coast Co., 200 U. S., 273.

(4) But the defendants not only failed to plead affirmatively the defense that the apex of the vein containing the ore body was in the San Carlos claim owned exclusively by them, but they expressly admitted the contrary. The answer in the former case expressly admitted *that the title to the ores was the same as the title to the claim.* The Skookum was a patented claim and it is presumed until the contrary is shown that the ores within a patented claim are a part of that claim. The suit proceeded on the claim of Hanley that misrepresentations as to the value of the ore in the Skookum had been made by his co-tenants. The complaint after alleging Hanley's ignorance proceeded:

"That the works penetrating said Skookum ground had "disclosed an immense body of ore of great value, etc. * * "that the ores contained in said Skookum mine are of such "value that there has been taken out of said ore body then "disclosed in said ground *up to the* present time *ore of the*

"*value of not less than $150,000 net,* over and above the cost "of mining, etc., * * that since about the 15th day of "May, 1898, said corporation defendant had been engaged "in working and mining the ores contained as aforesaid in "said Skookum mining claim, etc., * * that defendants "herein give out and assert since the record of said deed * * "that they own the Skookum claim, * * that they have "many million dollars' worth of ore in sight therein, and "that they intend to take the same to their own use; that said "described property is of no value except for the ore it con- "tains, and that defendants are rapidly exhausting the same, "etc., * * that the ore body of said Skookum mine, now "being worked and despoiled by said corporation defendant "is approached by a tunnel, etc., * * that said defend- "ants have not any estate, right, title or interest whatever in "said land and premises, or any part thereof, etc."

The answer denied the fraud, alleged the purchase of the interest from Hanley, denied that Sweeny and Clark represented to Hanley that the ground was of little value or that it contained no ore, and alleged (Record folio 80) that Hanley knew "*the extent, character and value of the ledge and "ores therein.*" The answer denied that any ore of value was disclosed at the time of the contract, and proceeded:

"Admit that since the ..... day of ....., 1899, the "said corporation defendant has been engaged in working and

"mining the ores contained in the said Skookum mining claim. "(Record folio 81.) * * Admit that they intend on "behalf of said corporation to extract the ores from the said "Skookum mine, and appropriate them to the use of said "corporation, the owner of said claim." (Record folio 82.)

It will thus be seen that in the pleadings in the former case the plaintiff alleged that he was the owner of the ores; that they were the only thing of value; that defendants claimed adverse interest. Defendants admitted that they claimed an adverse interest in the ores by reason of owning the Skookum claim and admitted that they intended to take out the ores and had taken out the ores. The Court having jurisdiction to try title to the claim could determine the title to every part of the claim including the ore bodies. As Judge Brewer remarked in the case of

Burton v. Huma, 37 Fed., 738,

"If a decree in an action to quiet title does not quiet "it, it is difficult to conceive the object or purpose of such "an action."

(B) THE DECREE IN THE FORMER CASE IS CONCLUSIVE UPON THE PARTIES HERE, AND ITS EFFECT, AND THE JURISDICTION TO ENTER IT HAS HERETOFORE BEEN DETERMINED IN ANOTHER SUIT.

We believe that we have fully established that from the

amended answer in this case and the exhibits attached thereto the former decree quieting Hanley's title was entered in a case over which the Circuit Court had jurisdiction on the equity side because of the allegations of fraud and because of the prayer for cancellation of the deed, and having acquired jurisdiction on that ground it had power under the pleadings to quiet the title and determine adverse claims to the property.

But it also clearly appears from the amended answer in this case (Fol. 41) that the precise question raised by appellant here, that is to say, the question of the power of the Circuit Court in the former case to enter a decree has itself been heretofore determined and the determination of the question of the power of the Circuit Court in the former case is *res adjudicata*. The amended answer states:

"That defendants in the said action thereupon offered to "prove that the said ore so extracted from underneath the "Skookum mine prior to that time was part of the vein having "its apex in the said San Carlos claim above referred to "owned by defendants, and that said San Carlos claim was so "located that its extralateral rights included the ore bodies "from which the said ore was extracted. The said offer to "prove the said fact was thereupon denied by the said Circuit "Court acting under the order of the United States Circuit "Court of Appeals for the Ninth Circuit in a certain

"mandamus proceeding brought in said Court to test the "question; that defendants in the said action thereafter and "at all times contended and insisted that they had a right "to show in the accounting that the ores taken from under "the Skookum claim were a part of the vein apexing in the "San Carlos claim, of which the defendants were the owners "and that the Court was without jurisdiction to render a "decree in the said action quieting title to the Skookum mine "or to the ore bodies referred to in the bill of complaint, but "its contentions and objections were overruled and the decree "averred by the complainant was rendered notwithstanding "such protests and objections." (Fols. 40, 41.)

It will thus be seen that both the Circuit Court and the Circuit Court of Appeals in the former case were called upon by appellants to determine the effect of the decree in the former case and to determine whether the Circuit Court had jurisdiction to quiet the title and in each count it was decided that the Circuit Court had jurisdiction to quiet the title to the claim and ore bodies.

It is too elementary to require a citation of authorities that a question of law or fact once heard and determined can not be raised again between the parties.

U. S. v. Southern Pac. Co., 168 U. S., 1.

The Circuit Court and the Circuit Court of Appeals both having determined in the former case the question now

presented here, the decision of those courts is conclusive, and the question could not be litigated in this suit unless the decree in the former case was absolutely void, because of an entire want of jurisdiction.

Noble v. Union River Co., 147 U. S., 173, 174.

It would not be sufficient to overcome the effect of such determination to convince this Court that either court in the former proceeding committed a mere error of law.

Cooper v. Reynolds, 10 Wall., 308.

Neither would it be sufficient to show that there was an adequate remedy at law because it has been frequently determined that the question of the adequacy of the remedy at law is one of privilege which may be waived; and is not jurisdictional in the sense that the proceedings of the Court after the question is raised and overruled are absolutely void.

As said by Chief Justice in *Perego v. Dodge*, 163 U. S., 160:

"Even if the action should have been an action at law, "still the *Court* had jurisdiction, and a defective exercise of "its power would only amount to an irregularity capable of "being waived by the parties and susceptible of correction as "any other mere errors are corrected."

And the Court of Appeals in *Lone Jack v. Megginson*, where the identical question was presented, said:

"The present case comes within the rule with its qualifica-
"tion. It is a case of which the Court would have had juris-
"diction if ejectment had been brought by the appellee against
"the appellant to recover possession of the property."

In the former case between the parties hereto if an action had been brought as one in the nature of trespass to try title, the Circuit Court would have had jurisdiction.

The decree, even though irregular, was not therefore absolutely void, because the *Court* either on the law or equity side had jurisdiction of the parties and the subject matter. The complaint tendered the issue of title, which issue was determined by the decree in favor of Hanley, and the decree was affirmed on appeal. We contend, therefore, that the decree was not only binding upon the parties, but the question of its validity has been heretofore raised and settled and neither determination can be upset here.

Respectfully submitted,

MYRON A. FOLSOM,
Attorney for Appellee.

Supreme Court of the United States.

No. 206.—October Term, 1906.

Empire State-Idaho Mining and Developing Company and Federal Mining and Smelting Company, Appellants,
vs.
Kennedy J. Hanley.

Appeal from the Circuit Court of the United States for the District of Idaho.

[March 25, 1907.]

The defendant in error, complainant below, brought suit in the Circuit Court of the United States for the District of Idaho against the Empire State-Idaho Mining and Developing Company and the Federal Mining and Smelting Company, appellants herein. The bill filed July 27, 1904, alleged diversity of citizenship as the ground of jurisdiction, and averred that the Empire State-Idaho Mining and Developing Company, the Federal Mining and Smelting Company and complainants are the owners and possessors, as tenants in common, of the Skookum mine and mining claim and the ores therein contained, situated in Yreka Mining District, Shoshone County, Idaho. The complainant was alleged to be the owner of an undivided one-eighth interest in the fee thereof, and the Empire State-Idaho Mining and Developing Company the owner of the undivided seven-eighths of said mine and claim.

There are other allegations, not necessary to be here set out, and then, in the eighth paragraph of the bill, it is alleged:

"8. That prior to May 17, 1902, the defendant Empire State-Idaho Mining and Developing Company extracted from said mine, through said tunnels, large quantities of ore and sold the same and received all of the proceeds thereof and paid no part of the same to complainant; that complainant brought suit on March 19, 1899, in the United States Circuit Court, District of Idaho (a court having jurisdiction of the parties and subject matter) against said defendant and Charles Sweeny and F. Lewis Clark, to recover his share of the proceeds and to quiet his title to said mine and ore bodies; and in said suit recovered a decree against said defendant Empire State-Idaho Mining and Developing Company, duly given and made in said United States Circuit Court at Moscow, Idaho, on or about November 17, 1902, for the sum of one hundred seventy-five thousand dollars ($175,000), and which decree quieted the title of this complainant to said one-eighth interest in said claim and ore bodies, a certified and attested copy of which decree was, on the — day of November, 1902,

recorded in Shoshone County, Idaho, and the amount decreed to complainant therein remains unpaid and unsatisfied, excepting the sum of $5,523.42; that as the result of an appeal from said decree by complainant the same was, on the tenth day of May, 1904, so modified as to make the amount thereof $255,061.40, with interest thereon from February 15 until paid, at seven per cent per annum, and the said amount and every part thereof is now unpaid."

The bill avers the extraction of a large amount of ore in which the complainant alleges he is entitled to an interest, and that the defendant the Empire State-Idaho Mining and Developing Company and the Federal Mining and Smelting Company deny the title of the defendant to the mining and ore bodies. It further avers that the defendants are appropriating the ores mined to their own use, and, after other allegations not necessary to be set out, prays for an injunction restraining the defendants from extracting ore from the Skookum mine pending the suit, and for an accounting for the ores extracted from the mines and claim since May 17, 1902.

By the amended answer the defendants, among other defenses, set up that the ores which they are extracting belong to a vein or lode not having its apex within the Skookum mining claim, but belonging to a vein having its apex within the lode mining claim lying to the north of the Skookum claim and a part of the San Carlos claim owned by the defendants, and deny that the defendants are mining any ores in which the complainant has any right, and avers that the claim thereto is without merit; and coming to answer the eight paragraph of the bill, setting up the decree upon which the plaintiffs relied for their title, the defendant set up paragraphs 6 and 7:

"6. Answering paragraph eighth of the bill, these defendants admit that an action was brought against the parties named in said paragraph as alleged therein, but deny that said action was brought to quiet title to said ore bodies, or that the decree therein did in fact quiet title to said ore bodies or to an undivided one-eighth interest therein in the complainant, and allege further concerning said decree in said action that the court, in the said action, had no jurisdiction to determine title to the said Skookum mine or to the ore bodies lying within or beneath the said mining claim, for the reason that the bill of complaint in the said action does not purport to be an action to quiet title to the said mine or ore bodies, nor does the same make a case for the quieting of title thereto, nor is it such as to authorize the decree rendered in said action purporting to quiet the title to said mine and ore bodies, and for the further reason alleged by defendants to be a fact, that no opportunity was given to the defendants therein to litigate the title to said ore bodies before the decree in said action purporting to quiet title was rendered, and for the further reason that at the time of the commencement of said action the defendant herein, Empire State-Idaho Mining and Developing Company, was, as shown by the complaint herein, in exclusive possession of such ore bodies and the complain-

ant was out out of possession thereof, and an action of law alone would lie in the Federal court to determine title to such ore bodies, and that the defendant therein, being the defendant, Empire State-Idaho Mining and Developing Company, had a right under the laws and Constitution of the United States to a trial by jury of the question of title to said ore bodies, and defendants allege that so much of the decree in said action as undertook or purported to quiet title to such ore bodies was and is absolutely void as to the Empire State-Idaho Mining and Developing Company, because the same constituted and was in fact an attempt to deprive it of its property without due process of law within the meaning of article 5 of the amendments to the Constitution of the United States, and because the same constituted an adjudication of its property rights without its consent by the court without a jury, contrary to the provisions of article 7 of the amendments to the Constitution of the United States.

"7. The defendants attach hereto, marked Exhibit A, and pray that the same may be taken as a part of this answer, copies of the complaint, answer and replication in the action referred to in the eighth paragraph in the bill, and allege that the same constituted the sole pleadings in the said action, and together with the evidence constituted the sole basis for the final decree rendered therein, a copy of which is attached hereto and marked Exhibit B, and made a part hereof; that after the replication in said cause was filed testimony was taken before an examiner, on the part of the complainant, in support of the allegations contained in the bill, to wit, the allegations that the defendants Clark and Sweeney had acquired the one-eighth interest in the Skookum mine from the complainant by fraud, covin and deceit, and testimony was introduced by the defendants contradicting the testimony of the complainant, and tending to support the affirmative allegations of the answer, and no testimony was offered or taken, either for complainant or defendants, concerning the said one-eighth interest, except the evidence for and against fraud, covin, and deceit, as before alleged. Thereupon the said cause was submitted to the court for decision, and the said Circuit Court entered a decree in favor of the defendants therein. Thereupon complainant in that suit appealed to the United States Court of Appeals for the Ninth Circuit from the said decree, and the said court, after a hearing upon the pleadings and the evidence before it, found that the allegations of the bill relating to the fraud in procuring title to the one-eighth interest claimed by the said Hanley were sustained by the evidence, and the decree was reversed and the cause sent back to the Circuit Court for the further proceedings in accordance with the opinion. Thereupon an order was made by the Circuit Court directing an accounting, and evidence was introduced by complainant to show the amount and value of ores extracted from the Skookum mine prior to May, 1902, by the defendants in said suit. That defendants in the said action thereupon offered to prove that the said ore so extracted from underneath the Skookum mine prior to that time was part of the vein having its apex in the said San Carlos claim, above referred to, owned by defendants, and that the said San Carlos claim was so located that its extralateral rights included the ore bodies from which the said ores were extracted. The said offer to prove the said fact was thereupon denied by the said court, acting under the order of the United

States Circuit Court of Appeals for the Ninth Circuit, in a certain mandamus proceeding brought in said court to test the question; that defendants in the said action thereafter, and at all times, contended and insisted that they had a right to show in the accounting that the ores taken from under the Skookum claim were a part of the vein apexing in the San Carlos claim, of which the defendants were the owners, and that the court was without jurisdiction to render a decree in the said action quieting title to the Skookum mine, or to the ore bodies referred to in the bill of complaint, but its contentions and objections were overruled and the decree averred by the complainant was rendered notwithstanding such protests and objections; and defendants aver that the said decree purporting to quiet title in said ore bodies was rendered without evidence being taken upon the said contention of the defendants, and without any evidence whatever being heard which threw any light upon the contention; and said decree was thereafter, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, affirmed, the court in said cause holding as ground for its action that the bill of complaint made a cause for quieting title to the one-eighth interest in the said Skookum mine and to the ore bodies in the limits thereof, and that the defendants in said cause, having failed to plead title to the ore bodies in themselves by virtue of the facts hereinbefore set up, were estopped to litigate the said facts."

The complainant below filed exceptions to this amended answer, in which he averred that in the former decree the title to the ore bodies in question was quieted and that the issues made in that case were within the jurisdiction and power of the court to determine, and that the question of the right and title to one-eighth of the Skookum mine and mining claim and ores therein contained had been determined in the former suit in favor of the complainant and the said question had become *res judicata* in a court having jurisdiction of the parties and the subject matter.

Upon hearing the exceptions to the amended answer, they were sustained and the answer held insufficient. Thereupon the defendants, averring that the court was in error and that the said amended answer constituted a defense, declined to plead further, and elected to stand upon the amended answer. The complainant thereupon moved the court for a final decree for one-eighth of the amounts stated in paragraph 9 of the answer to have been mined as therein stated. A final decree was rendered accordingly, and thereupon a direct appeal was taken to this court.

Mr. Justice DAY delivered the opinion of the Court.

In the brief and argument of the learned counsel for the plaintiff in error it is said: "The sole question in the case is whether, on the facts set up and pleaded in the answer, there was jurisdiction in the United States Circuit Court in the former suit to render the judgment quieting in the complainant Hanley title to one-eighth of *all* the ore bodies found within

the boundaries of the Skookum mining claim. The lower court thought the answer failed to show want of jurisdiction and sustained complainant's exceptions."

A preliminary question for examination in this court, although not made in argument by counsel, is whether this court has jurisdiction of this case by direct appeal from the judgment rendered in the Circuit Court of Idaho. It is apparent from the statement preceding this opinion that the extent and effect of the adjudication in the first case, wherein the complainant alleges title was decreed to him, was the real controversy between the parties. The complainant contended that the court in the former case had adjudicated title to all of the ore bodies found within the boundaries of the "Skookum claim." The defendants contended that the ore bodies in controversy belonged to another mine, the San Carlos, the property of the defendants, by reason of the fact that they are of a vein which has its apex in the San Carlos mining claim and not in the Skookum; and that the decree in the former suit was without jurisdiction in so far as it undertook to quiet title for such ore bodies, because the pleadings in that suit made no case for such decree.

If this case can come here by direct appeal it must be because it is within section 5 of the Court of Appeals Act, 1891, providing for direct appeals in certain cases from the Circuit Court to this court. Sec. 5, 29 U. S. Stat. 492. It cannot be brought directly here as a case in which the jurisdiction of the court is in issue; for the jurisdiction challenged is not that of the court rendering the decree from which this appeal is taken, but is that of the court rendering the former decree, which is set up in the complaint as the basis of the title sued upon. *In re Lennon*, 150 U. S. 393.

If the case is properly here, it must be because it is one which involves the construction or application of the Constitution of the United States. It has been repeatedly held that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and the case must be one in which the construction or application of the Constitution of the United States is involved as controlling. We think this case is not of that character. It is evident that the real issue as to the former judgment was whether it was *res judicata* between the parties, or, as contended by the plaintiff in error, rendered without jurisdiction. The court in deciding against the plaintiff in error decided that the court had jurisdiction and that the former decree was conclusive. This decision does not necessarily and directly involve the construction or application of the Constitution of the United States.

In *World's Columbian Exposition* v. *United States*, 56 Fed. Rep. 657, Mr. Chief Justice Fuller, speaking for the court, said: "Cases in which the construction or application of the Constitution is involved, or the constitu-

tionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws."

In re Lennon, 150 U. S., *supra*, was a proceeding in *habeas corpus* to discharge a party held upon an order for imprisonment for failing to pay a fine imposed for contempt. The petitioner alleged that the Circuit Court had no jurisdiction of the case in which the order of injunction had been issued, for violation of which the petitioner was alleged to be guilty of contempt; and that it had no jurisdiction either of the subject matter or of the person of the petitioner. The application being denied and direct appeal being taken to this court, it was held that it would not lie under section 5, Act of March 3, 1891, because the jurisdiction of the Circuit Court of the petition for *habeas corpus* was not in issue, nor was the construction or application of the Constitution involved. Of the latter phase of the case Mr. Chief Justice Fuller, speaking for the court, said:

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

In *Carey* v. *Houston & Texas Central R. R. Co.*, 150 U. S. 170, in which a bill in equity had been filed in order to impeach and set aside a decree of foreclosure on the ground of fraud and want of jurisdiction in the foreclosure suit, it was held that no case for appeal directly to this court was made as one that involved the construction or application of the Constitution of the United States. In that case Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors and

jurisdictional defects in the foreclosure proceedings and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

The cases cited were followed and the principles deducible therefrom applied in *Cosmopolitan Mining Company* v. *Walsh*, 193 U. S. 460. In that case it was contended, in a replication to an answer setting up certain former judgments rendered against the complainant as a bar to the suit brought by it to recover possession of the real property sold under the judgments, that they were awarded without due process of law, in violation of the Fourteenth Amendment. And this was upon the theory that the service of process in the State courts upon the corporation's agent in the suits where the judgments were rendered was unauthorized by the laws of the State or the general principles of law. It was held that the case was not one directly involving the construction or application of the Federal Constitution within the meaning of section 5 of the act of March 3, 1891, and the writ of error was dismissed.

We think the principles involved in these cases decisive against jurisdiction in this court of this appeal. It is true that it is averred in the sixth paragraph of the amended answer above set forth that in the action to determine title to the ore bodies the mining company had the right under the laws and Constitution of the United States to a trial by jury, of which it was deprived; and that so much of the decree as undertook to quiet title to the ore bodies was rendered without jurisdiction, because the same constituted and was in fact an attempt to deprive the defendant of its property without due process of law in violation of the Federal Constitution. But these averments of conclusions as to constitutional rights do not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction or application of the Constitution of the United States.

The thing relied upon in this case was the controlling effect as *res judicata* of a decree rendered between the parties in another suit. And the real issue was as to the jurisdiction of the court to render the decree. The determination of that question did not involve the construction or application of the Constitution of the United States. The Circuit Court held that the court rendering the first decree had jurisdiction to determine the owner-

ship of the ore bodies underneath the surface of the Skookum claim. The court thus really decided a question of *res judicata* between the parties upon general principles of law. And it does not convert the decision into one involving the construction and application of the Constistitution of the United States to aver, argumentatively, that to give such effect to a former adjudication under the circumstances amounts to depriving a party of due process of law.

We are of opinion therefore that the case does not come within the fifth section of the Circuit Court of Appeals Act as one directly appealable to this court.

The writ of error is dismissed for want of jurisdiction in this court.

True copy.

Test:

Clerk Supreme Court, U. S.